92-1922

No. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PEOPLE OF THE TERRITORY OF GUAM,

Petitioner,

vs.

DANIEL LUCIEN TURNER,
MARTIN M. VILORIA,
JOHN GOKITA MANIBUSAN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Ninth Circuit's acceptance of the "two inference" definition of reasonable doubt, as an accurate expression of Circuit law, conflicts with the holding of *Holland v. United States*, 348 U.S. 121 (1954), and with various Circuits' construction of *Holland*?

II. Whether the Ninth Circuit, by reviewing an ambiguous jury instruction for prejudice under a "reasonably possible" standard, rather than for a "reasonable likelihood" thereof, conflicts with the standard set in *Boyde v. California*, 494 U.S. 370, (1990), and with the authority of Circuits construing *Boyde*?

III. Whether the Ninth Circuit, by conducting a factual review for prejudice which did not consider counsel's use of the trial court's instructions, and gave limited consideration to other matters of context related to the jury's interpretation of the questioned instruction, conflicts with the test for consideration of instructional error stated in *Cupp v. Naughten*, 414 U.S. 141 (1973), and with authority from other Circuits on this point?

IV. Whether the Ninth Circuit, by replacing the conclusions of law and fact expressed by the Appellate Division of the District Court of Guam with its own such conclusions, without according any deference to either set of determinations, conflicts with the deferential review doctrine expressed in *Bonet v. Texas Company*, 308 U.S. 463 (1940), and violates Congress' mandate to the Appellate Division contained in 48 U.S.C. § 1424-3, to such an extent that it is a departure from the accepted course of Judicial proceedings that calls for the exercise of the Supreme Court's supervisory power to correct it?

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PETITION FOR WRIT OF CERTIORARI

The Territory of Guam ("Guam") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reviewed a judgment of the Appellate Division of the District Court of Guam which had affirmed the judgment of conviction, for aggravated murder and related offenses, as to all the named respondents. The Ninth Circuit reversed the convictions. It did so because the trial judge advised the jury that a statement of law presented by defense counsel, which propounded a form of the two-inference definition of reasonable doubt, was "inaccurate". The Ninth Circuit's decision was based on the conclusion that the two-inference formulation of reasonable doubt correctly expresses the law of that Circuit. After preliminarily determining that the trial judge's remark was error the panel found prejudice using a "reasonable possibility" test for such.

In doing so the Ninth Circuit panel apparently ignored certain facts, some of which had led the Appellate Division to conclude there was no prejudice in the trial judge's comment. In finding prejudice, the panel rejected the Appellate Division's conclusion to the contrary, as well as various factual assessments that had led to that conclusion, with no indication of deference to the Appellate Division's determination of fact or law. The Ninth Circuit's decision undermines Guam's judicial system, and consequently, its independent government.

OPINIONS BELOW

The unpublished order of the Ninth Circuit denying rehearing, and which amends its prior decision in this matter, is reproduced in Appendix A. The unpublished memorandum decision reversing the judgment of conviction is set out at Appendix B. The unpublished opinion of the District Court of Guam is reproduced at Appendix C. The Judgment of conviction entered in the Superior Court of Guam is set forth in Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 16, 1993. Petitioner timely submitted, under a grant of extension, a Petition for Rehearing on January 20, 1993, which was denied in an order dated February 24, 1993. The Ninth Circuit's exercise of jurisdiction below was based upon 48 U.S.C. § 1424-3(c). The Appellate Division of the District Court of Guam had jurisdiction by virtue of 48 U.S.C. § 1424-3(b). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principle statutory provision involved is the Organic Act of Guam, 48 U.S.C. §§ 1421-1428, which establishes a civilian government with an independent court system for the Territory of Guam. The text of §§ 1424, 1424-1, 1424-2 and 1424-3, governing Guam's judiciary, is set out in Appendix E.

Section 90.23 of Criminal Procedure Code of Guam states:

§ 90.23. Reasonable Doubt: Defined; May be Read to Jury Verbatim.

(a) Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."

(b) In charging a jury, the court may read Subsection (a) to the jury and no further instruction defining reasonable doubt need be given.

STATEMENT

The three Defendants, named as Respondents in this Petition, were indicted in the Superior Court of Guam on June 1, 1989 for multiple counts of aggravated murder and for robbery, burglary and the possession and use of a deadly weapon in commission of a felony. The first trial conducted in this matter proceeded from March 19, 1990 through April 17, 1990. It ended in a mistrial[1].

The issues presented arise from the second trial which began on July 9, 1990. They pertain to the jury instructions provided by the trial court on reasonable doubt. Some background on the proceedings of the case are essential to an understanding of the instructions' context. Of special importance was the prosecution's reliance on direct, as opposed to circumstantial, evidence.

The government's theory, as supported by testimony at trial, was generally as follows: The defendants, along with two others, had entered the home of a Carlos Bossi and Mari Tanaka, in Old Perezville, Guam, on the night of November 8, 1986 for the purpose of robbing the couple. While there the defendants had threatened

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[1] The jury, after returning to the court with verdicts of guilty, was polled. One of the jurors indicated that the verdict read was not her verdict. Thereafter, the panel was unable to reach unanimity.

and beaten the two residents to get them to open a safe which was on the premises. The victims were unable, under the stress of the circumstances, to open the safe. The robbery was aborted after those involved received indications, via police band radio, that police were on the way. Both residents of the house were killed by the defendants and their accomplices before the robbers fled.

At trial the fact and general circumstances of the Bossi and Tanaka homicides were largely uncontested. The issue litigated was that of identity. The Territory of Guam used direct evidence to establish its case. This included eyewitness testimony from two cooperating witnesses who had admitted involvement in the killings and testified as to the participation of all three defendants[2]. A John Nahalowaa, who had been involved with transporting a vehicle for use after the murders, but who was never charged criminally, placed the two cooperating witnesses and the three defendants together at the time of the crime. There was also corroborative testimony from others that served to confirm the eyewitness accounts.

At the conclusion of the trial the court instructed the jury on the law. In charging the jury on the meaning of reasonable doubt, the court read the provisions of § 90.23(a) of Criminal Procedure Code of Guam, as is expressly authorized by § 90.23(b) thereof. There was no objection to this instruction by any defense counsel. There was no request made for any other instruction on reasonable doubt.

Closing arguments followed. During his argument, counsel for Defendant Manibusan presented to the jury a chart which listed various legal doctrines which counsel told the jury it must apply in this case. One of these "instructions" apparently defined reasonable doubt in terms of the two-inference rule, which advises jurors to resolve inferences that support conflicting hypotheses in favor of the accused. The trial court, recognizing that the definition that counsel was presenting on "reasonable doubt" was not that which had been

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[2] It should be noted that one of these, Joseph Manibusan, who was the brother of one defendant and the cousin to another, provided different testimony at this trial than he had previously. However, his prior testimony was introduced as substantive evidence and his later version was thoroughly impeached with that and other material. In any event, his change in testimony does not change the fact that the government's proof was through the direct evidence of eyewitnesses.

instructed upon, stopped counsel's argument. The judge then instructed the jury, by reference to an item on counsel's chart, that "counsel's number 4 is an inaccurate statement of the law".

The trial judge did not indicate to the jurors what the inaccuracy was. Counsel for Defendant Manibusan did not make his chart an exhibit. Neither he, nor any of the other defense counsel present, read the wording of "number 4" into the record, or took any other steps to preserve its specific contents for review.

The defendants were subsequently found guilty of aggravated murder, and sentenced to life imprisonment without parole. On appeal, all three defendants claimed, among other things, prejudicial error in the trial court's comment regarding the counsel's presentation of the two-inference rule.

The Appellate Division of the District Court of Guam held that counsel's characterization of the law, which the Appellate Division found similar in substance to *California Jury Instruction (CALJIC)* 2.01, ¶¶ 3-4 (5th Ed. 1988), was "not incorrect as a matter of Constitutional law, [but] was not the approved jury instruction for this jurisdiction or one submitted for this trial." [Appendix C at 27a (citation omitted)]. After reviewing the factual circumstances of the instructions and closing arguments, the Appellate Division found that the trial court's negation of the two-inference instruction was without prejudice in the context of this case. It similarly found that defense counsel's conduct, in arguing to the jury an instruction which had not been approved by the court, was the direct cause of the court's interruption of counsel's argument and the instruction countering counsel's representation.

In its review, the Court of Appeals held that the two-inference instruction <u>was</u> a correct expression of Ninth Circuit law and that the trial court's instruction neutralizing it was clear error. It defined the issue before it as limited to whether the error was harmless. The panel reviewed the error under a "reasonably possible" standard for harm. Its opinion gives no indication that it considered various factors which the Appellate Division found dispositive to the contrary. It implicitly and explicitly overrode various findings which the Appellate Division had reached, some without discussion. There is no indication in the opinion that any form or degree of deference was accorded the Appellate Division's conclusions of fact or law.

The Territory of Guam petitioned for a rehearing on the basis that the Ninth Circuit had applied the wrong body of substantive law in reviewing the challenged instruction. The court of appeals denied the petition, re-emphasizing that the two-inference instruction is substantively correct and that the trial judge's phrasing of his countering instruction was prejudicial in effect.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S ACCEPTANCE OF THE "TWO INFERENCE" DEFINITION OF REASONABLE DOUBT, AS AN ACCURATE EXPRESSION OF CIRCUIT LAW, CONFLICTS WITH THE HOLDING OF *HOLLAND V. UNITED STATES*, 348 U.S. 121 (1954), AND WITH VARIOUS CIRCUITS' CONSTRUCTION OF *HOLLAND*.

It is clear from the Ninth Circuit's memorandum decision of December 16, 1992 that it's finding of error was based on the conclusion that Ninth Circuit law[3] holds the two-inference instruction to be inherently valid. (Appendix C at p. 4a). It began its analysis essentially as follows:

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[3] There is no question but that the Ninth Circuit panel erred first when it selected Ninth Circuit law as the appropriate benchmark. A prior *en banc* decision of the Ninth Circuit establishes that Guam incorporated the substance of California's law on reasonable doubt by adopting, essentially verbatim, California's statute defining the concept. *See Guam v. Yang*, 850 F.2d 507, (*en banc*) (9th Cir. 1988). A panel decision following *Yang* reiterated that conclusion. *Guam v. Ibanez*, 880 F.2d 108 (9th Cir. 1989), *cert. den.* 496 U.S. 130-31 (1990). Based on California's caselaw, Guam's law would require a "two inference instruction" where the proof is predominantly circumstantial, but proscribes such where, as here, the proof is direct. *People v. Gould*, 54 Cal.2d 621, 7 Cal. Rptr. 273, 277, 354 P.2d 865 (*en banc*) (1960). More recently the California Supreme Court held that where the prosecution does not "'substantially rely' on circumstantial evidence to prove [the] defendant guilty", defense requests for the two-inference instruction are properly denied by the court. *People v. Wright*, 276 Cal.Rptr 731, 755-56 (Cal. 1990). This case was based, as the Ninth Circuit panel noted, on accomplice testimony. (Appendix B at p. 5a, n.2).

> [Counsel's] argument reflected the "two inference instruction," which, although criticized, is a correct statement of Ninth Circuit law. The only question is whether the court's error was harmless.
> (*Id.*)(citations omitted)(footnote omitted)

The two inference instruction is not an accurate instruction on reasonable doubt. It has been criticized by this Court, various Circuits of the Court of Appeals, and by commentators. This Court stated in *Holland v. United States*, 348 U.S. 121, 137-38 (1954) that an instruction of this type is "confusing and incorrect" and should not be given where, as here, the jury has otherwise been properly instructed on reasonable doubt. There is substantial authority for the proposition that the two-inference instruction is not only confusing but actually dilutes the concept of reasonable doubt, by encouraging jurors to engage in a balancing test more akin to a preponderance of the evidence test. *See, e.g. 1A Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* 4.01 at 4-15 (1992) (cited by the Ninth Circuit panel in both its memorandum (Appendix B at 4a) and its order denying rehearing (Appendix A at 2a)).

There is substantial disapproval of the two inference instruction in other Circuits, which appear to follow *Holland* with some degree of consistency[4]. Even within the Ninth Circuit, the weight of authority appears to go against the position taken by the panel of the

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[4] Representative examples of cases which follow *Holland* in approving the refusal of a two-inference type instruction, include the following: *United States v. Coombs*, 464 F.2d 842, 843 (D.C. Cir. 1972), *Taglianti v. United States*, 398 F.2d 558, 568 (1st Cir. 1968), *United States v. Warren*, 453 F.2d 738, 745 (2nd Cir. 1972), *United States v. Stubin*, 446 F.2d 457, 465 (3rd Cir. 1971), *United States v. Hildreth*, 387 F.2d 328, 329 (4th Cir. 1967), *United States v. Haggins*, 565 F.2d 1009, 1012 (5th Cir. 1977), *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984), *United States v. Fryer*, 419 F.2d 1346, 1350 (8th Cir. 1970), *Wall v. United States*, 384 F. 2d 758, 762 (10th Cir. 1967), and *United States v. Johnson*, 713 F.2d 633, 653 (11th Cir. 1983). The Seventh Circuit follows the practice of providing no definition of the term "reasonable doubt". *See, e.g. United States v. Hall*, 854 F.2d 1036, 1038-39 (7th Cir. 1988).

Court of Appeals below[5]. While the panel cites a series of cases which it indicates to establish the legitimacy the two-inference instruction, (*See* Appendix A, p. 2a) these appear to be cases where the validity of the instruction itself was not litigated[6].

While there is some validity in the two-inference instruction under Guam law, it is a misleading and inaccurate definition of reasonable doubt in this context and cannot justify the Ninth Circuit's application of the doctrine, which it based on its supposed general acceptance within the Circuit[7]. The Ninth Circuit considered the

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[5] *See*, *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969). There the defense had requested an instruction which would have required that circumstantial evidence "exclude every hypothesis but that of guilt". *Id.* at 1240. The panel noted first that the Supreme Court in *Holland v. United States*, 348 U.S. 121 (1954), had criticized a similar instruction and then interpreted *Holland* as indicating that no distinction is to be drawn between circumstantial and direct evidence when considering reasonable doubt. The *Nelson* court also indicated that no guidance beyond the basic definition of reasonable doubt was necessary or appropriate, and stated that the rule adopted from *Holland* was consistent with prior Ninth Circuit caselaw. *Id.* at 1241-43. Numerous cases follow *Nelson* in the Ninth Circuit, including *United States v. Heck*, 499 F.2d 778, 790 (9th Cir. 1974) and *United States v. Sukumolachan*, 610 F.2d 685 (9th Cir. 1980). *See also*, *Sablan v. Guam*, 434 F.2d 837, 839 (9th Cir. 1970) (applying the holding in *Nelson* to a context where the sufficiency of the evidence is considered).

[6] The panel cites *United States v. James*, 576 F.2d 223, 227 as establishing that the two-inference instruction accurately describes reasonable doubt. While the *James* decision concededly rejects a challenge to such an instruction, that decision does not address the propriety of the instruction in itself. James' attack on the jury charge was repelled first because he failed to properly request the desired instruction, *Id.* at 226, and foremost because the instruction given substantially expressed what he had requested "We believe the substance of James' desired instruction was more than adequately given". *Id.* at 227. The decision passes over, not upon, the relative merits of such an instruction. The two other decisions cited by the panel go no further than *James*. *United States v. Grayson*, 597 F.2d 1225, 1230, (9th Cir. 1979), declined to find error in a trial court's refusal to give the two-inference instruction in view of the other instructions already provided, although it suggested, in *dicta*, that the trial judge would have had the discretion to do so. In *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1982) the panel, without in anyway endorsing the content of the two-inference instruction, approved its rejection by the trial judge.

[7] *See* note 3, at p. 6, *supra*.

correctness of the "two-inference" instruction in a vacuum, without concern for the factual context in which defense counsel sought it and the court rejected it. The Court of Appeals was apparently unwilling to consider whether this instruction would be inaccurate or misleading in a case resting squarely on direct evidence[8].

The decisions confronting the two inference instruction generally do so in the context of circumstantial evidence. (*See, e.g. United States v. Grayson*, 597 F.2d 1225, 1230, (9th Cir. 1979); *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1982); *United States v. James*, 576 F.2d 223, 227. *See also, Holland v. United States*, 348 U.S. 121, 137-38 (1954)). This was not a case that dealt with such proof to any substantial degree. The Ninth Circuit acknowledged that the government's case was developed primarily through accomplice testimony (Appendix B at 5a, n.2), which would obviously be direct evidence, yet it found prejudice on the basis that the instruction given "suggested to the jury that if torn between two equally reasonable hypotheses it could still convict" (*Id.*) (emphasis added).

The two-inference instruction has been widely criticized even in the context where it bears the most logical relevance to the application of the reasonable doubt standard: in situations where the jury is asked to draw inferences from circumstantial evidence. However, here, in a case which was presented through direct evidence, it was grossly misleading, and inaccurate. *See, e.g. People v. Jernan*, 29 Cal.2d 189, 197, 173 P.2d 805 (1946) (noting policy concerns behind limiting use of the two-inference instruction to include the danger of misleading and confusing the jury when a case consisting of primarily direct evidence is put before them.) A jury cannot be tasked with comparing "hypotheses", without circumstantial evidence and inferences to rest them on. Such an instruction misdirects the

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[8] However, the panel did label the prosecutor's comments, which indicated that the two-inference instruction applied only to circumstantial evidence, as erroneous. (Appendix B at 5a, n. 3). This indicates that the panel drew no distinction between the instruction in one context or the other.

attention and comprehension of the jury in all cases where the issues for decision rest on direct evidence[9].

The Ninth Circuit based its assessment of error using substantive law which conflicts with this Court's holding in *Holland v. United States*, 348 U.S. 121 (1954), and case authority following it across the Circuits. The Court should grant the writ in order to resolve the conflict and to specifically clarify when, if ever, the "two-inference" test is valid.

II. THE REASONABLE POSSIBILITY TEST APPLIED BY THE NINTH CIRCUIT IN DETERMINING PREJUDICE DIRECTLY CONFLICTS WITH DECISIONS OF THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUIT COURTS OF APPEALS, AS WELL AS WITH THE AUTHORITY OF THIS COURT IN *BOYDE V. CALIFORNIA*, 494 U.S. 370 (1990).

The Ninth Circuit expressly reviewed the record using a "reasonably possible" test to determine whether the questioned instruction was prejudicial. (Appendix B, p. 4a). This standard,

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[9] There are indications in the record that counsel for Defendant Manibusan deliberately sought the two-inference instruction to use in a misleading manner. It was apparently used to leverage an argument that the jury could compare, as two competing scenarios, the government's evidence of the case and that reflected in statements made by a Cathy Burger and "Person A" (James Leon-Geurrero). *See* Appendix C at 17a (quoting counsel's argument as it related to the two-inference instruction: Counsel first tells the jury the two-inference instruction applies where "you look at different sets of facts" and then he goes on to suggest as a possible line of thought for the jurors during deliberation:

> "'And I listened to the statements made by Cathy Burger and the person labelled "A", and it is reasonable that maybe [the Defendants] didn't do it". You don't have a choice. You have to come back with a not guilty verdict. So when you're given a choice between two and they're both reasonable you have to come back with a not guilty verdict.")

This was misleading because the statements of Cathy Burger and "Person A" were found to be unreliable hearsay and admitted into evidence for the limited purpose of impeachment. *C.f.* Appendix C at 16a (discussing the admission of certain hearsay statements for impeachment alone). An argument that used the two-inference model to have these statements compared with the government's case as competing reasonable hypotheses would appear to be a calculated abuse of the instruction.

which appears questionable generally[10], is not applicable to the issue at bar. The proper standard is whether it is "reasonably probable" that the instruction in question prevented the jury from properly applying the reasonable doubt standard to its deliberations. *See Boyde v. California*, 494 U.S. 370, (1990) (holding, in the context of a habeas corpus review, that an ambiguous instruction bearing on the defendant's Eighth Amendment rights in a death penalty case would be reviewed for a "reasonable likelihood" of prejudice)[11].

The *Boyde* standard is appropriate because the instruction at issue, rather than being erroneous in substance, was ambiguous. The trial court explicitly instructed the jury verbatim with Guam's statutory definition of reasonable doubt. (Guam Criminal Procedure Code at § 90.19(a)). This was a proper and sufficient explanation which apprised the jury of the high standard to which the evidence must be held. *C.f. Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988) (*en banc*) (holding that Guam courts must instruct on reasonable doubt using this language). Only after defense counsel presented an unauthorized and misleading definition of reasonable doubt to the jury did the court intervene to state that counsel's "number 4 is an inaccurate statement of law". The trial court's comments were not in substance incorrect because it was proper to remove the two-inference instruction from the jury's consideration[12].

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[10] The standard applied here was drawn from a dubious line of Ninth Circuit cases which holds that instructional errors in criminal proceedings are always reviewed for a "'reasonable possibility'" that the error materially affected the verdict." Appendix B at 4a. (emphasis in original), *citing* to *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977) (which actually indicates that there is uncertainty in the Circuit as to the appropriate standard of review) and *United States v. Rubio-Villareal*, 967 F.2d 294, 296 n.3 (9th Cir. 1992).

[11] *See also, Estelle v. McGuire*, __U.S.__, 112 S.Ct. 475, 482, __L.Ed2d. __ (1991). (citing *Boyde* for the proposition that "in reviewing an ambiguous instruction . . . we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.")

[12] The Ninth Circuit panel appears to acknowledge this much in its decision denying rehearing. Appendix A at 2a.

Because the court indicated simply that it was inaccurate, without elaboration, there was no affirmative indication to the jury of how "number 4" should be regarded, except to be simply ignored (which was apparently the court's intention). While ambiguous, the natural effect of the court's instruction would have been to cause the jurors to rely on the explicit definition of reasonable doubt which the court had already provided.

The specific contents of the trial court's instruction on this point remains ambiguous on appeal. The court's comments, which incorporated by direct reference the content of defense counsel's written "instruction", are not known in detail because counsel did not preserve it for the record[13].

Any possible prejudice must flow from ambiguity. Thus *Boyde, supra*, expressly carves out a distinct standard of review for ambiguous instructions, must apply. In *Boyde v. California*, 494 U.S. 370, (1990), this Court reviewed for prejudice an instruction that advised jurors how to consider mitigating circumstances in sentencing the defendant to life or death. The instruction indicated simply that the jury could consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime". (494 U.S. 370, _____, 110 S.Ct. 1190, 1194.) *Boyde* claimed that the instruction "did not allow the jury to consider mitigating evidence of the defendant's background and character". (*Id.* at 1195.) This Court first resolved that the instruction was not in itself incorrect and went on determine that "reasonable likelihood" of prejudicial effect was the appropriate standard of review.

In *Estelle v. McGuire*, __ U.S.__, 112 S.CT. 475, 482, n.4, __L.Ed. 2d__, the Court reaffirmed its commitment to the standard set forth in *Boyde*, expressly overruling inconsistent tests for

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[13] Because the court's interjection was directed to the content of "number 4" specifically, and counsel for the defense chose not to make the phrasing of "number 4" a part of the record, the import of the court's guidance to the jury is made all the more uncertain and ambiguous for the purposes of appeal. It was incumbent on defense counsel to preserve this. *See, e.g. United States v. Wilson*, 904 F.2d 656 (11th Cir. 1990), *cert. den.* __U.S.__, 1112 S.Ct. 250, 116 L.Ed2d 205 (1990) (indicating that the obligation is on appellants to ensure that an adequate appellate record is compiled).

prejudice that were stated in two cases that had followed it: *Cage v. Louisiana*, 498 U.S. __, 111 S.Ct 328, 112 L.Ed.2d 339 (1990) and *Yates v. Evatt*, 500 U.S.__, 111 S.CT. 1884, 114 L.Ed. 2d 432 (1991). *McGuire* indicated that *Boyde* was to be broadly interpreted. 112 S.CT. 475, 482, n.4 (citation omitted).

Consequently, there is inconsistency in the manner in which the Circuits have applied *Boyde* under *McGuire*; specifically as to whether the "reasonable likelihood" test is intended for all claims of instructional error or only those presenting ambiguity, and whether the standard is employed in direct federal appeals as well as in reviewing state judgments in habeas proceedings[14].

The Fourth Circuit, in *United States v. Craigo*, 956 F.2d 65 (4th Cir. 1992), applies the standard in a direct appeal from a district court judgment. *See also*, *United States v. Cobb*, 905 F.2d. 784 (4th Cir. 1990) (same). *Craigo* also indicates a willingness to apply the standard, not only where the instruction is ambiguous, but also where it is "clearly error". 956 F.2d at 67. The District of Columbia Circuit has applied the rule in the context of a direct appeal, *United States v. Merlos*, 984 F.2d 1239, 1241 (D.C. Cir. 1993). In that case it termed the questioned instruction, which defined reasonable doubt in terms of the jurors' "strong belief", as ambiguous. (*Id.*) The Third Circuit, which has not yet addressed the issue in the context of a direct federal appeal, has suggested that it may apply the *Boyde* standard to all claims of instructional error, ambiguous or otherwise. *Rock v. Zimmerman*, 959 F.2d 1237, 1247, n. 3 (3rd Cir. 1992). The Eighth Circuit has so far found the standard to be applicable to ambiguous instructions. *Karras v. Leapley*, 974 F.2d 71 (8th Cir. 1992).

The Ninth Circuit has applied the *Boyde* test but only in a case involving habeas review and there to an instruction termed ambiguous. *See Jeffries v. Blodgett*, 974 F.2d 1179, 1193 (1992). In

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[14] Some Circuits, such as the Second have not addressed the issue. Both the Fifth and Eleventh Circuits have acknowledged *Boyde* without having occasion to apply it's holding. *See Wilkerson v. Collins*, 950 F.2d 1054, 1060 (5th Cir. 1992) and *Stephans v. Zant*, 968 F.2d 1076, 1086 (11th Cir. 1992). *See also*, *Hill v. Maloney*, 927 F.2d 646, 651 (1st. Cir. 1990) (applying *Boyde* in a factually analogous setting).

United States v. Koshnevis, 979 F.2d 691 (9th Cir. 1992) and *United States v. Velasquez*, 980 F.2d 1975 (9th Cir. 1992) the Ninth Circuit did not apply *Boyde*. *Koshnevis* was a direct appeal involving a challenge to a jury instruction which permitted the jury to draw an inference of possession if they found certain facts. The issue is similar to that in *McGuire*, *supra*, except that the Ninth Circuit applied a "reasonable possibility" test, based on *United States v. Rubio-Villareal*, 967 F.2d 294 (9th Cir. 1992), and determines after a predominantly factual analysis of the record, that there was no prejudice.

In *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992) the Ninth Circuit reviewed, on direct appeal, a challenge to a jury instruction which defined proof beyond a reasonable doubt as "proof 'that leaves you firmly convinced'". In affirming the conviction the panel applied neither the *Boyde* test of "reasonable likelihood" nor the test of "reasonable possibility", instead simply holding that a definition of reasonable doubt using "firmly convinced" as an evidentiary standard was not erroneous.

Boyde's test of reasonable likelihood should have been applied to the case at bar, rather than the "reasonable possibility" test advanced in *Rubio-Villareal*. The instruction at issue here, which advised the jury that a confusing statement of law presented by counsel was inaccurate, but did not describe in what manner, can only be considered erroneous through ambiguity[15].

Although the present case was considered by the Ninth Circuit on direct appeal, *Boyde* is not properly limited to proceedings on habeas petitions. At least two Circuits of the Court of Appeals have interpreted *McGuire* as extending *Boyde* to ambiguous jury instructions

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[15] As discussed above the Ninth Circuit panel does appear to label the instruction substantively defective under Ninth Circuit law. However, it has been shown that Ninth Circuit law is inapposite to the question and that, in any event, the panel's construction of Ninth Circuit law is erroneous.

on direct appeal as well as in habeas proceedings[16]. The language used by the Court in both *Boyde* and *McGuire* support the conclusion that these Circuits are correct in doing so.

When this Court adopted the "reasonable likelihood" test in *Boyde* it made reference to other legal contexts where that standard had previously been used. 494 U.S. at 370, __, 110 S.Ct. 1190, 198, n.4, __L.Ed.2d__. The discussion there identifies various Constitutional violations; such as ineffective assistance of counsel, the prosecutor's suppression of exculpatory evidence, etc.; where "reasonable likelihood" of prejudice is the standard which a criminal defendant must meet to obtain relief[17].

The logical underpinnings of the *Boyde* test, as expressed there, support its application in all instances where an ambiguous instruction is in issue. The impact of an ambiguous instruction is necessarily speculative. As this Court noted in *Boyde*:

> The 'reasonable likelihood' standard . . . better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction.

Estelle v. McGuire, __U.S.__,112 S.Ct. 475, 482, n. 2 __L.Ed.2d__ (1991) supports even broader application of the *Boyde* test; expressing it in terms that seem intentionally far-reaching: "In

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[16] In *United States v. Merlos*, 984 F.2d 1239 (D.C. Cir. 1993) the D.C. Circuit applied the *Boyde* test, to a direct appeal from a district court judgment, to determine whether there was error in a reasonable doubt instruction which used the term "strong belief" as a benchmark. In two instances the Fourth Circuit has applied the *Boyde* standard in affirming judgments on direct appeal. *See United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990) and *United States v. Craigo*, 956 F.2d 65 (4th Cir. 1990).

[17] *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 874, 102 S.Ct. 3440, 3450, 73 L.Ed.2d. 1193 (1982) (applying reasonable likelihood to question of whether due process is violated by deportation of defense witnesses prior to trial) and *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985) (applying reasonable probability of prejudice test to prosecution's alleged suppression of evidence).

Boyde . . . we made it a point to settle on a single standard of review for jury instructions—the "reasonable likelihood" standard—after considering the many different phrasings that had previously been used by this Court." (Citation omitted). After *McGuire*, in which the Court went to considerable lengths to establish what appears to be a single standard, the *Boyde* test would arguably apply to the review of all jury instruction alleged erroneous.

In *Holland v. United States*, 348 U.S. 121, 140 (1954), this Court recognized a distinction, for purposes of review, between instructions causing "confusion" and those leading to "misapprehension". *Boyde* expressly established that ambiguous instructions, are to be reviewed for a "reasonable likelihood" of prejudice. The Ninth Circuit, which has indicated in recent opinions that it will always apply a "reasonable possibility" test when reviewing jury instructions for error[18], has rejected this distinction. The District of Columbia and Fourth Circuits have embraced it. This Court should grant certiorari to address apparent conflict between the Ninth Circuit, and the District of Columbia and the Fourth Circuits, respectively, as to the appropriate application of the *Boyde* test.

III. THE FACTUAL REVIEW CONDUCTED BY THE NINTH CIRCUIT IN THIS MATTER CONFLICTS WITH THE STANDARD SET FORTH IN *CUPP V. NAUGHTEN*[19], BECAUSE THE PANEL BELOW FAILED TO CONSIDER ALL MATTERS IN THE RECORD BEARING ON THE JURY'S INTERPRETATION OF THE QUESTIONED INSTRUCTION.

Cupp v. Naughten, 414 U.S. 141, 147 (1973) cites *Boyd v. United States*, 271 U.S. 104, 107 (1926) to reiterate the rule that questioned jury instructions must be evaluated for prejudice in the context of the entire charge. *Cupp* is routinely cited for this proposition not only in habeas proceedings but on direct appeals. *See, e.g. United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988). A reading of *Cupp* however, indicates that it requires that the

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[18] *United States v. Rubio-Villareal*, 967 F.2d 294, 296-97 (9th Cir. 1992) and *United States v. Koshnevis*, 979 F.2d 691, 696 (9th Cir. 1992).

[19] 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d. 368 (1973).

challenged instruction be placed in the context of the entire trial. The rule does "recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp*, 414 U.S. at 147. It would appear to indicate that, at the very least, all matters in the record that bear a logical relationship to the jury's interpretation of the instructions should be considered in determining its harmfulness.

Regardless of how *Cupp* is construed it appears certain that the Ninth Circuit's factual review so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In determining that the trial court's statement to the jury, that "counsel's number 4 is an inaccurate statement of law", was prejudicial, the panel essentially ignored the fact that the counsel in question did not preserve the content of his "number 4" so that any prejudice in the court's comment could be clearly discerned. The Court of Appeals found that the content of counsel's written chart was sufficiently preserved from the argument on record that counsel made from it[20]. Given that the court's counter to counsel's "instruction", was to negate it in its own terms (by reference to its number on the chart) it would appear that the wording of "number 4" is of considerable importance. The determination of prejudice from a jury instruction requires "careful attention to the words actually spoken to the jury". *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). Where those words incorporate a written illustration by reference such that they are meaningless without that reference, the absence of such an illustration is obviously of great consequence, and should not be overlooked.

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[20] Appendix B, at p. 4a, n. 1: "We reject the States's contention that this claim was not properly preserved for appellate review. Appellants did not make a record of the counsel's exact statement as written on a courtroom blackboard, but the substance of counsel's statement was repeated to the jury and recorded in the trial transcript." It is worth noting first that the medium used by counsel to present his written statement of the law was noted by the Appellate Division simply to be a demonstrative chart (Appendix C at p. 17a) and there is no indication in the record that counsel's was using a "courtroom blackboard" rather than a posterboard of his own. While this may seem a minor point, it is significant in the sense that the Ninth Circuit appears, in this and other matters here, to go out of its way to excuse the defense counsel's contribution to both the error raised, and the difficulty in reviewing it.

The Ninth Circuit's memorandum decision silently ignores several facts which the Appellate Division found to be of major consequence in finding that no prejudice obtained. Most notable among these was that, following the trial court's interruption of Counsel for Defendant Manibusan, and the interjection of the challenged instruction, all counsel went on to explain reasonable doubt to the jury. (Appendix C at 27a). Under *Cupp v. Naughten*, *supra*, this would be worth noting in any case. But in this situation it had special significance. According to the Ninth Circuit's decision the trial judge's remark had a devastating effect because it was made during closing argument. (Appendix B at 5a). The trial judge interrupted defense counsel *sua sponte* to correct a point of law which counsel had presented. It can be inferred that when the various counsel subsequently presented their explanations of reasonable doubt without interruption, that a reasonable jury would see these as being implicitly approved by the court.

The respective panels below assessed defense counsel's contribution to the error quite differently. The Appellate Division, in determining whether there was prejudicial error, found that the trial court's interjection of the questioned instruction was "invited" by defense counsel's presenting a nonapproved, improper definition of reasonable doubt. (Appendix C at 27a). The Ninth Circuit, in expressly overriding the Appellate Division's conclusion held that comments made by the prosecutor in rebuttal closing offset the defense counsel's misconduct. (Appendix B at 5a, n. 3) However, the prosecutor's "fault" went only so far as telling the jury that the two-inference instruction applied to circumstantial rather than direct evidence. (*Id.*) Furthermore, the Ninth Circuit's minimization of the invited error here is directly at odds with the Seventh Circuit's treatment of very similar case where the defense counsel, though perhaps less culpable, was held responsible for causing any instruc-

tional error[21]. It appears from the record that the Ninth Circuit conducted a factual review which ignored certain matters of significance, and minimized others.

The determination of prejudice in this case should have been a mixed fact-law question in which factual questions predominated[22]. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984), defining the concept, by reference to *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), in terms of whether the issue is essentially factual in nature. Under *McConney* a district court's determination of such issues is subject to review for clear error only[23]. *Id.* at 1202-03. But there is no indication that the Ninth Circuit gave real consideration, much less deference, to the Appellate Division's factual conclusions.

It appears that the Ninth Circuit applied a limited factual review and rejected, without consideration, conclusions of fact reached by the appellate panel whose decision it reviewed. This does not meet

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[21] In *United States v. Glass*, 846 F.2d 386 (7th Cir. 1988), that court, which normally permits no instruction on the definition of reasonable doubt, dealt with a case where the district court, upon request from defense counsel, allowed argument on its meaning, but gave no instruction on it. The jury, confused, subsequently requested an instruction from the court on reasonable doubt, and the trial judge refused to provide any. In affirming the judgment of conviction the Court of Appeals noted that it was Glass' counsel who caused the problem by attempting to define reasonable doubt, holding him responsible even though he had obtained the prior approval of the court to argue the point.

[22] In this case the analysis employed by the Ninth Circuit applied a questionable Ninth Circuit doctrine which assumed error in the challenged instruction and then sought prejudice using a "reasonable possibility" test. However, the analysis should have hinged on a factual determination of the probable effect of the words used on a reasonable jury.

[23] There is admittedly a question as to whether the Ninth Circuit should treat the Appellate Division of the District Court of Guam, as a district court for the purposes of *McConney*. Here it is sitting as an appellate tribunal rather than trial court. However, *McConney* also speaks of concerns of judicial administration and indicates that the court best positioned to make factual or legal determinations should be that entrusted to do so. The Appellate Division, as the Appellate panel first reviewing alleged trial errors, should be given this role and its determinations reviewed for clear error.

the requirements of *Cupp v. Naughten*, *supra*. Under the circumstances of this case it is so extreme a departure from the accepted and usual course of judicial proceedings that this Court should grant the writ to exercise its powers of supervision to correct this error[24].

IV. THE MANNER IN WHICH THE NINTH CIRCUIT REVIEWED THE JUDGMENT OF THE APPELLATE DIVISION COMPLETELY NULLIFIED ITS ROLE IN GUAM'S APPELLATE PROCESS. THIS VIOLATES THE CONGRESSIONAL MANDATE PROVIDED THE APPELLATE DIVISION IN 48 U.S.C. § 1424-3 AND CONFLICTS WITH AN ESTABLISHED LINE OF DECISIONAL AUTHORITY OF THIS COURT[25]. THE COURT SHOULD GRANT THE WRIT TO CORRECT AN EXTREME DEPARTURE FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS REFLECTED IN THIS MATTER.

As is discussed above, the Ninth Circuit Court of Appeals substituted its own body of substantive law for that of Guam in reviewing the correctness of the jury instruction in question. The panel reviewed this ambiguous instruction to determine, incorrectly, if it was "reasonably possible" that prejudice resulted from it. In conducting its review the Ninth Circuit panel also discounted, without serious consideration, the legal and factual conclusions

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[24] In this case the Ninth Circuit accorded no deference to the Appellate Division's review for prejudice and its finding that none existed, simply ignoring its reasoning for the most part. There are admittedly questions as to what deference the Appellate Division is due, since it sits as an intermediate appellate court in a specialized context. The manner in which the Ninth Circuit treats its own panels, when it sits *en banc*, strongly suggests some modicum of deference was due to the Appellate Division. *See, e.g., United States v. Rubio-Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (*en banc*) (remanding to three judge panel of Ninth Circuit to permit that court to consider whether, in light of legal determinations reached in the decision, the instructional error found was harmless).

[25] *See Bonnet v. Texas Company*, 308 U.S. 463, 470-71 (1940) -and cases cited therein. Holding that Territorial courts are to be accorded deference in determining issues of local law. *See also, Guam v. Olsen*, 431 U.S. 195, 204, n.10 (1977) (indicating that Guam's judiciary is to be treated like the judiciaries of the other Territories).

reached by the Appellate Division. The manner in which the review was conducted amounts to the nullification of the Appellate Division's role in Guam's Appellate structure. In this respect, the decision extends *Guam v. Yang*, 850 F.2d 507, 509-11 (9th Cir. 1988) (*en banc*). There, the Ninth Circuit resolved that it would no longer apply a standard of deferential review to the Appellate Division's determination of Guam's local law.

Prior to *Yang*, the Ninth Circuit would reverse the Appellate Division's interpretation of local law only if "clear and manifest error is shown" *Gumataotao v. Guam*, 322 F.2d 580, 582 (9th Cir. 1963) (citation omitted). After *Yang*, the review of such issues is *de novo*. 850 F.2d at 509-11. By this transition the Circuit not only departed from a long line of its own precedent, but from this Court's as well. *See, e.g. De Castro v. Board of Com'rs of San Juan*, 322 U.S. 451 (1944) (requiring clear and manifest error before federal appellate courts reverse Territorial courts on matters of local law) and *Bonnet v. Texas Company*, 308 U.S. 463, 471, (1940) ("To justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous").

The Ninth Circuit's rejection of the rule was based on a three-fold rationale: That only one of the judges sitting on the Appellate Division in that case was a "local" judge; that a previous Ninth Circuit case; *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984) (*en banc*), resolved that decisions of district court judges interpreting state law are reviewed *de novo*, and because the Third Circuit had concluded, in *Saludes v. Ramos*, 744 F.2d 992 (3rd Cir. 1984), that it would not give deference to the similarly structured Appellate Division of the District Court of the Virgin Islands. *Yang*, 850 F.2d at 509-11.

The *Yang* Court's reasoning on these points was not well supported[26]. The *Saludes* case did not present an actual conflict because the panel there relied upon a factor not present in Guam's circumstances. In rejecting deferential review for the Appellate Division of the District Court of the Virgin Islands, the panel emphasized that because the Virgin Islands has left a substantial portion of local original jurisdiction to the District Court "it is frequently the District Court in the Virgin Islands that serves as the trial court and interprets law in the first instance". 744 F.2d at 994[27]. In fact, *Saludes* appears to have been just such a case, where the trial court had been the District Court of the Virgin Islands. Guam, though having a similar jurisdictional statute, does not share this situation[28].

The Third Circuit also based its rationale on a reading of Supreme Court authority which restrictively interpreted it as applying the deference rule only to those Territories having insular courts. *Saludes*, 744 F.2d at 993-94. As is discussed below, this Court's deferential review is based on policy which has equal application to courts such as the Appellate Division of Guam, which "wear two hats" so to speak.

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[26] The Yang decision is otherwise questionable in its reasoning. The Circuit, clearly using its supervisory authority, reversed the judgment of conviction because the trial court had given a definition of reasonable doubt based upon "hesitation to act" instead of Guam's statutory definition of "moral certainty". This reversal was done without a review for harmless error, despite a requirement clearly expressed for such in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). The Ninth Circuit had, in previous (though unpublished) decisions, approved use of the challenged instruction in Guam's courts. *Yang*, 850 F.2d at 512, n.8. Though certiorari was not sought from this court in *Yang*, it was sought, and denied, in a subsequent case which expanded *Yang*'s effect. *Guam v. Ibanez*, 880 F.2d 108, *cert. den.*, 496 U.S. 930-31 (1990).

[27] The panel cited to 48 U.S.C. § 1612, which reserves to the District Court such original jurisdiction as is not assumed through local legislation.

[28] While 48 U.S.C. § 1424(c) reserves residual jurisdiction for the District Court of Guam using similar language, in application it is apparently different because Guam, having enacted a complete set of codes dealing with criminal and civil matters has acted to divest the District Court of such original jurisdiction entirely. *See*, *Guam v. Olsen*, 431 U.S. 195, 197-98, nn. 3 and 4 and accompanying text (1977).

The *McLinn* decision, which *Yang* portrays as establishing that District Court judges should not be given deference in their determinations of local law, relied very heavily on the fact that these judges sit alone rather than in panels and that their determinations lack one of the major safeguards associated with appellate review:

> It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law. Thus, de novo review of questions of law, like clearly erroneous review of questions of fact, serves to minimize judicial error by assigning to the court best positioned to decide the issue the primary responsibility for doing so.

(*Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984) (quoting *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (*en banc*)).

That *McLinn*'s rationale does not apply to the Appellate Division, because it is a three judge panel, was expressly stated in a prior Ninth Circuit decision, *Brown v. Civil Service Com'n*, 818 F.2d 706, 708 (9th Cir. 1987). The *Yang* court failed to address that case law, as it failed to address the string of decisions of this Court which require deferential review of a Territory's determination of its own law.

In justifying its permanent shift to *de novo* review of the Appellate Division's interpretations of local law, the Ninth Circuit relied on the fact that the panel below included only one local judge, rather than the two which are permitted under the statutory scheme for its composition[29]. The *Yang* court stated that since a majority

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[29] One of the three judges on the appellate panel is the district court judge from Guam, 48 U.S.C. § 1423-3(b). Another is typically from the Northern Mariana Islands. *See S. Rep. No. 1582, 85th Cong., 2d Sess.* (1958), *reprinted in* 1958 *U.S.C.A.A.N. 2623; H.R. Rep. No. 951, 85th Cong., 1st Sess.* (1957) (stating that Congress' intent was that judges assigned to Guam's courts be from the general vicinity of Guam) Guam is geographically part of the Northern Marianas Islands and the two share a common culture, language and history. *See* Arnold Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 316, 521-22 (1989).

of the panel were outsiders, they lacked as a group, any presumptive expertise in the local law. (*Id.* at 510). The Ninth Circuit noted that even if an additional member of the panel were from the neighboring Northern Marianas Islands it would not affect this analysis. This remark reflects an oversight in the *Yang* Court's review of the deference standard's policy bases. The rule does not apply simply because a local judge may better know the local law, but because a judge situated in the locale may better understand the socio-economic context in which the law is applied. Given the similarities between Guam and the Northern Marianas a judge from there would have substantial expertise in understanding the application of Guam's law[30].

Prior decisions of the Ninth Circuit, applying the deference standard, acknowledged the broader policies for its application. In *Brown v. Civil Service Com'n,* 818 F.2d 706, 708 (9th Cir. 1987), a panel considered whether the deferential standard for its review of Guam's Appellate Division should survive *McLinn*. In holding that it did, *Brown* noted the court's previously stated justification that "'local Guam needs and customs may differ from those with which federal courts would otherwise be familiar. . . .'" (quoting *Laguana v. Guam Visitors Bureau*, 725 F.2d 519, 520-21 (9th Cir. 1984). *See also*, *Aguon v. Calvo*, 829 F.2d 845, 847 (giving deferential review on "matters of local law, custom or policy") and *Gumataotao v. Guam*, 322 F.2d 580, 582 (1963) (citing as basis of rule that "local needs, customs and legal systems may differ").

The policies discussed in Supreme Court opinions bearing on deferential review of Territorial courts indicate this standard was not

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[30] *See* n.29, *supra*. The case at bar presents an example of how an understanding of culture can make a difference in the application of local law. The Appellate Division noted in its opinion below that this appeal arose from a retrial after the first trial had ended with a hung jury. (Appendix C at 14a). However, that panel went on to note that in the first trial the jury had returned a guilty verdict, but that one juror when polled indicated that the verdict announced was not her's. (*Id.*) The Ninth Circuit cited the fact of a prior hung jury, without comment on these circumstances, as an indication that the evidence was insufficiently strong to make a serious error harmless. (Appendix B, at 5a, n.2). The Appellate Division, with at least one judge who was familiar with the effect that a close-knit island community may have on a juror being polled, was able to see some significance in how the jury became hung.

intended to apply solely to those Territories having their own insular courts. The rationales expressed are often similar to those addressed in the Ninth Circuit cases described above, which express concern for societal context. In *Diaz v. Gonzales*, 261 U.S. 102, 106 (1923), Mr. Justice Holmes, pointed out the profound influence that culture has in the interpretation of law in this context:

> When we contemplate [a system built on Spanish law] from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from books.

The passage above was quoted with both approval and emphasis in *Bonnet v. Texas Company*, 308 U.S. 463, 470, n. 17 (1940). Other decisions of this Court emphasize not only the importance of respecting the context in which law is interpreted but in permitting a body of case law to develop that is reflective of the community's own values and traditions[31].

Yang also failed to take into account Congress' intent in creating Guam's judiciary. *Yang* expressly stated that the Ninth Circuit is Guam's Supreme Court until such time as the Guam legislature

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[31] "'Orderly development of the Government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedures and tribunals of the Island.'" *Bonnet v. Texas Company*, 308 U.S. 463, 471 (1940) (quoting from *Sancho Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505, 510 (1939). *See, e.g. In re Sawyer*, 360 U.S. 622, 640 (1959) ("this Court and the Courts of Appeals must give the Territorial Courts freedom in developing principles of local law, and in interpreting local legislation").

creates one[32]. 850 F.2d at 510, n.4. However, this Court's opinion in *Guam v. Olsen*, 431 U.S. 195, 203, suggests that Congress intended the Appellate Division to serve that function:

> It was also envisioned that the district court would serve as an appellate body once local courts were established. The apparent reason for eliminating the provision for a local supreme court was to avoid duplicative judicial machinery. . . . (Quoting from, and expressly adopting, then Judge Kennedy's dissenting opinion in *Agana Bay Dev. Co. (Hong Kong) Ltd v. Supreme Court of Guam*, 529 F.2d 952, 961 (9th Cir. 1976).

In *Olsen* this Court considered whether § 22 of the 1950 Organic Act of Guam permitted the Guam Legislature to create a Supreme Court that could supplant the Appellate Division of the District Court of Guam. *Olsen* concluded that it could not because it found Congress had mandated a specific role for the Appellate Division which the Guam Legislature was not authorized, at that time, to eliminate. In reaching this conclusion the Court specifically noted that Congress had consistently provided procedures for review of Territorial Courts and that the available legislative history indicated that Guam was to be treated no differently. 431 U.S. at 203-04 (text at n.10).

The manner in which the Appellate Division came into being leaves no doubt that it is, by origin, a local appellate court. It was created in 1951, under the authority of the Organic Act, by the Guam Legislature through Public Law 17, which granted exclusive jurisdiction in certain matters to the Island Court of Guam, and provided that appeals from that forum would be heard by three-judge panels of the Appellate Division of the District Court of Guam. *Guam v. Olsen*, 431 U.S. at 197. Seven years later Congress amended § 22 of Guam's Organic Act to formally adopt the three-

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[32] Through Public Law 21-147 (signed into law Jan. 14, 1993), the Guam Legislature has enacted legislation that creates a Supreme Court for the Territory. However, the rules which will govern its procedures, and the persons who will act as its judiciary, have yet to be determined. The Ninth Circuit's treatment of the Appellate Division's decisions should not be discounted because of Guam's prospects for a functioning Supreme Court.

judge panel appellate division that Guam had fashioned, and defined the jurisdiction of that forum to be "such appellate jurisdiction as the [Guam] legislature may determine". Act of June 4, 1958, Pub. L. 85-444, § 1, 72 Stat. 178 (codified as amended at 48 U.S.C. § 1424-3). *See Guam v. Olsen*, 431 U.S. at 197; *Agana Bay Dev. Co. (Hong Kong) Ltd. v. Supreme Court of Guam*, 529 F.2d 952, 960 n.2 (9th Cir. 1976) (J. Kennedy dissenting). The Ninth Circuit continued to review final decisions of the Appellate Division. 48 U.S.C. § 1424-3(c).

Since the Appellate Division has been found the functional equivalent of Guam's Supreme Court, it must be accorded deference in its decisions as such under the line of cases reflected in *Bonnet v. Texas Company*, 308 U.S. 463, *supra*. The relevant legislative history indicates that, after 1984, Congress affirmatively intended that this deference be provided.

The Senate explanation of the 1984 amendment[33] to the judicial provisions of Guam's Organic Act referred to the Ninth Circuit's decision in *Camacho v. Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir. 1982) which applied a deferential review standard to a decision of the Appellate Division of the District Court of the Northern Mariana Islands. "'Interpretations of local law by a district court sitting in the locality are entitled to great weight. They will not be disturbed unless clearly wrong'" *Id.* (quoting *S.A. Empressa De Viacao Rio Grandense v. Boeing Co.*, 641 F.2d 746, 752 (9th Cir. 1981)). Congress equated the judicial system of the Northern Marianas to that of Guam. *See, e.g.* 130 Cong. Rec., at 23,791 and 25,746. *Compare* 48 U.S.C. §§ 1424 to 1424-3 *with* 48 U.S.C. §§ 1694-94c. The Senate explanation also indicates explicit awareness of, and sensitivity to, Guam's relationship with the Ninth Circuit as a reviewing appellate court. In discussing a transition period during which a future Guam Supreme Court would be subject to Ninth Circuit review, the Senate Committee notes the following:

> The Committee is aware of the long experience which Guam already has of having appeals taken to the Ninth

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[33] 48 U.S.C. § 1424-2 (originally enacted as Act of Oct. 5, 1984, Pub. L. 98-454, Title VIII, § 801, 98 Stat. 1742). The amendment authorizes, with some conditions, the Guam legislature to create a Supreme Court for Guam.

> Circuit from the district court of strictly local matters and the concern that a shorter transition period should be enacted. (130 Cong. Rec. at 23790)

The reference to *Camacho v. Civil Service Commission*, *supra*, and Congress' failure to modify that rule indicates "Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. at 703). The Senate Committee's expressed knowledge of the manner in which Guam's "strictly local matters" are reviewed give substance to this presumptive inference.

It appears certain that the deferential review standard spelled out in *Bonnet v. Texas Co.*, *supra*, applies to the Ninth Circuit's review of the Appellate Division's decisions. Even if not, the review undertaken here by the Court of Appeals violates Congress' intended role for the Appellate Division, because it has been reduced essentially to a nullity. The review discarded, without regard, all significant determinations of fact and law on this issue. It is certain that Congress intended the Appellate Division to have a more significant part in the development of Guam's law.

This Court should exercise its supervisory authority to determine what standard of review must be accorded by the Ninth Circuit Court of Appeals to determinations of local law by the Appellate Division. Guam requires a consistently evolving body of case law to properly develop as a Territory. Litigants and trial judges need some sense that there is a developing body of law that remains consistent under appellate review. In order to obtain this there needs to be some degree of deference accorded by the Ninth Circuit to local determinations of

law[34] Guam's decisional law must be shaped in a forum that is institutionally geared to determining the law, customs and traditions of a pacific island community that was a Spanish colony less than one hundred years ago and a Japanese colony at half that[35].

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[34] *Yang* and its progeny illustrate the difficulty that Ninth Circuit review presents. Prior to that decision the Appellate Division was accorded deference and the Ninth Circuit approved Guam's use of a nonstatutory reasonable doubt instruction because it had been approved by the Appellate Division. *Yang*, 850 F.2d. at 511. In *Yang*, the court sitting *en banc* held that even though the defendant had not objected to the nonstatutory instruction his conviction would be reversed, in significant part because he had informally requested the statutory instruction. The *Yang* court emphasized that its holding was specific to the unique facts of the case. 850 F.2d at 512, n.9. In *Guam v. Ibanez*, 880 F.2d 108, 111 (9th Cir. 1989), *cert. den.* 496 U.S. 130-31 (1990), a panel of the Ninth Circuit extended the *Yang* rule to a case where the Appellant had not even requested the statutory instruction, much less objected to it. In the present case, which the Ninth Circuit decided on Dec. 16, 1992, the trial court instructed the jury using the statutory instruction required by *Yang*, and the Ninth Circuit panel deemed it defective under principles of Ninth Circuit law. Memorandum Decision of Dec. 16, 1992, at 2. *But C.f.*, *Guam v. Borja, et al.*, 983 F.2d 914 (9th Cir. 1993), affirming convictions where the appellants had failed to object to nonstatutory instruction, when jury instruction occurred after date that Ninth Circuit granted rehearing *en banc* in *Yang*. *Compare also*, *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992), upholding, over defendant's contemporaneous objection, a jury instruction which equated proof beyond a reasonable doubt with proof that leaves one "firmly convinced".

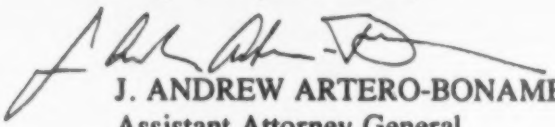
[35] Besides the need to have a forum that incorporates an understanding of local culture into its decision making, there are logistical problems that disadvantage the Ninth Circuit institutionally. The number of judges in the Circuit, in conjunction with district judges sitting by designation, virtually guarantees that the judicial mind brought to bear on a case, i.e. the particular combination of judges, will not recur when related cases are considered. This randomness is laudable and generally helps to ensure fairness by requiring panels to decide issues based on published precedent. However, it can be a kiss of death to cases from a jurisdiction like Guam, which has very little of its own published precedent and often presents issues as to what body of substantive law should be applied. The Ninth Circuit's treatment of Guam cases may also be impaired by the absence of procedural rules which would allow them to be processed in a manner procedurally distinct from the Ninth Circuit's usual fare. The Appellate Division of the District Court of Guam has a complete set of rules which defines its specialized role in Guam's appellate system. The Ninth Circuit has one rule that may arguably be considered specialized to this end. Ninth Circuit Rule 26-1 provides an extension of seven days to most filing deadlines, "in cases arising from the Districts of Guam and the Northern Marianas Islands". This

(continued . . .)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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[35](. . .continued)
would apparently include matters arising directly from the district courts. An example of an area where rules specialized to Guam would be appropriate is in Ninth Circuit rule 11-1.1 which provides that, in all cases, the reporter's transcript is to be transmitted within 30 days of its designation/request. The term expressed in the rule is reflected in the Circuit's briefing schedule as a standard practice, even for cases from the Superior Court of Guam. But, there is no time needed for transcription in these cases because the transcript was necessarily prepared for proceedings before the Appellate Division. The Ninth Circuit has not configured itself in any way, despite authority to do so in 48 U.S.C. § 1424-3(c), to differentiate its self-described function as Guam's Supreme Court from its other roles as a United States Court of Appeals. [This is not stated as criticism of the court or any of its judges but only to make the point that the Appellate Division is in a better position institutionally to serve this function.]

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10612

PEOPLE OF THE TERRITORY OF GUAM
Plaintiff-Appellee,
vs.
DANIEL LUCIEN TURNER
Defendant-Appellant.

No. 91-10624

vs.
MARTIN M. VILORIA
Defendant-Appellant.

No. 92-10002

vs.
JOHN GOKITA MANIBUSAN
Defendant-Appellant.

ORDER
[Filed February 24, 1993]

Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

The petition for rehearing is denied.

The Attorney General argues that our decision is in conflict with Guam law that a "two-inference" instruction should not be given in a case involving direct evidence. *People v. Wright*, 276 Cal. Rptr. 731, 755-56 (1991); *Guam v. Yang*, 850 F.2d 507, 513 (9th Cir. 1988) (en banc) (California law applies in interpreting Guam instruction on reasonable doubt). We agree that such an instruction should not be given. While the two-inference instruction accurately describes reasonable doubt, see *United States v. Miller*, 688 F.2d 652, 662 (9th Cir. 1981); *United States v. Grayson*, 597 F.2d 1225, 1230 (9th Cir. 1979); *United States v. James*, 576 F.2d 223, 227 (9th Cir. 1978), Guam, like many jurisdictions, refuses to give the instruction because it is confusing. See *Wright*, 276 Cal. Rptr. at 755-56; *United States v. Kahn*, 821 F.2d 90, 93 (2d Cir. 1987); *1 Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* ¶4.01 at 4-15 (1992). However, the question before us was not whether such an instruction should have been given, but whether defendants were prejudiced by the court's instruction to the jury that defense counsel had incorrectly stated the law when he described the two inference rule.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-10612

PEOPLE OF THE TERRITORY OF GUAM
Plaintiff-Appellee,
vs.
DANIEL LUCIEN TURNER
Defendant-Appellant.

No. 91-10624

vs.
MARTIN M. VILORIA
Defendant-Appellant.

No. 92-10002

vs.
JOHN GOKITA MANIBUSAN
Defendant-Appellant.

MEMORANDUM*
[Filed December 16, 1992]

Appeal from the United States District Court
for the District Court of Guam, Appellate Division

Argued and Submitted November 3, 1992
Honolulu, Hawaii

Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or for the courts of this circuit except as provided by 9th Cir. R. 36-3.

Daniel Turner, Martin Viloria and John Manibusan were indicted for aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony. Their first trial ended in a mistrial because the jury was unable to reach a verdict. On retrial, Turner, Viloria and Manibusan were convicted on all counts. The District Court of Guam, Appellate Division, affirmed the convictions, finding the trial court's errors harmless. We conclude the erroneous instruction regarding reasonable doubt was not harmless and address some of appellants other claims to provide guidance on retrial.

1. Reasonable Doubt

The trial court plainly erred by instructing the jury that defense counsel's statement in closing argument as to the meaning of reasonable doubt was not an accurate statement of law. Defense counsel told the jury that if the evidence reasonably permitted either a conclusion of guilt or a conclusion of innocence the jury must find for the defendants. The argument reflected the "two inference instruction," which, although criticized, see, e.g., *1A Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions* ¶ 4.01 at 4-15 (1992), is a correct statement of Ninth Circuit law. *United States v. James*, 576 F.2d 223, 227 n.3 (9th Cir. 1978). The only question is whether the court's error was harmless.[1]

The importance of an accurate instruction on reasonable doubt, and the presence of circumstances aggravating the error in this case, compel the conclusion that "there is a reasonable possibility that the error materially affected the verdict." *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977) (emphasis in original). See also *United States v. Rubio-Villareal*, 967 F.2d 294, 296 n.3 (9th Cir.

[1] We reject the State's contention that this claim was not properly preserved for appellate review. Appellants did not make a record of the counsel's exact statement as written on a courtroom blackboard, but the substance of counsel's statement was repeated to the jury and recorded in the trial transcript.

1992). The prosecution's evidence was strong but not so decisive as to alter this conclusion.[2]

We have said "a conviction should not rest on ambiguous and equivocal jury instructions on a basic issue." *United States v. Washington*, 819 F.2d 221, 226 (9th Cir. 1987). No issue is more basic than whether guilt has been proven beyond a reasonable doubt. The reasonable doubt standard "is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. 358, 364 (1970). Accordingly, we have said a reasonable-doubt charge must "fairly and accurately convey the meaning of a reasonable doubt." *United States v. Wosepka*, 757 F.2d 1006, 1008 (9th Cir. 1985). The charge in this case, taken as a whole, did not "fairly and accurately convey the meaning of a reasonable doubt." Rather, it suggested to the jury that if torn between two equally reasonable hypotheses it could still convict.

The effect of the court's error was aggravated by other circumstances. Because the error was made during summations, the erroneous instruction was the court's last statement to the jury regarding reasonable doubt. Moreover, the prosecutor reinforced the error by repeating it in his rebuttal summation, and by erroneously advising the jury that defendant's accurate statement of law applied only to circumstantial evidence and was inapplicable to this case because the prosecution had produced direct evidence of guilt.[3]

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[2] The primary witnesses were cooperating accomplices who had an interest in currying favor with the government. As noted above, the first trial ended with a hung jury. *United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (prior hung jury is a factor in determining whether error is harmless beyond a reasonable doubt).

[3] In finding the error harmless, the District Court, Appellate Division stated that defense counsel precipitated the error by using an instruction that had not been approved by the court. The prosecutor was equally at fault for exacerbating the trial judge's mistake.

2. Hostile Witness

The trial court's ruling that the prosecution's witness, John Manibusan, was a hostile witness and that the prosecutor therefore could use leading questions in his examination, fell within the court's broad discretion under Guam Rule of Evidence 611(c). 6 Guam Code. Ann. § 611(c) (1987). See also *Miller v. Fairchild Indus., Inc.*, 876 F.2d 718, 734 (9th Cir. 1989) (quoting McCormick on Evidence at 12 (1984)). John Manibusan was plainly a hostile witness. He had testified for the prosecution in the first trial, but completely renounced his previous testimony soon after taking the stand in the present trial. (Tr. Vol. I at 81).

3. Impeachment with Prior Inconsistent Statements

We respectfully disagree with the conclusion of the Appellate Division that no error occurred in the prosecutor's use of prior inconsistent statements made by John Manibusan to Paul Suba and Claudia Manibusan to impeach John Manibusan's trial testimony.

Because the prior statements were admissible only for impeachment and not as substantive evidence, 6 Guam Code Ann. §§ 613(b), 801(d)(1)(A), the trial court should have advised the jury "at the time the prior inconsistent statement[s] [were] admitted: and again at the end of trial, that "the statement[s] may be considered only as bearing on credibility." *United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977) (quoting *Bartley v. United States*, 319 F.2d 717, 719 (D.C. Cir. 1963). No instruction was given when Claudia Manibusan and Officer Suba testified as to the prior statements by John Manibusan, and although the trial court gave a general instruction at the end of trial that prior inconsistent statements were to be considered solely to determine a witness' credibility, the instruction did not direct the jury's attention to the testimony regarding John Manibusan's statements. (Tr. Vol. X at 32).

Furthermore, if these statements are offered on retrial, the court should consider whether the prosecution is impeaching his own witness' testimony as a "'subterfuge' to get otherwise inadmissible testimony before the jury." *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984). When a party impeaches its own witness, "'the

maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised." *Ragghianti*, 560 F.2d at 1381 (quoting *United States v. Cunningham*, 446 F.2d 194, 197 (2d Cir. 1971) (Friendly, J.)). It may be that Manibusan's testimony had already been "cancelled out" by the admission of his testimony at the first trial as substantive evidence, and the only purpose of proving his statements to Suba and Mrs. Manibusan was to corroborate his prior testimony that had already been admitted. The prosecution may demonstrate on retrial, however, that this testimony has additional impeachment value.

3. Expert Witness

The trial court's refusal to permit an attorney to testify as an expert witness to refute Nahalowaa's claim that he had not made any deals in exchange for his testimony was within the trial court's "broad discretion . . . to conclude that, on balance, the jury would not benefit from the admission of the proffered evidence." *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986); 6 Guam Code Ann. § 702 (expert testimony admissible if it will "assist the trier of fact"). The jury had sufficient evidence of Nahalowaa's motivation to curry favor with the government. Nahalowaa testified he believed he was an accessory to murder and was afraid he might be charged with that crime. (Tr. Vol. VII at 41). The expert testimony would have been cumulative and of little additional assistance to the jury.

3. False Statements to the Jury

Appellant Viloria argues the prosecutor lied to the jury by stating that Viloria had failed to raise his alibi defense prior to trial.

The alibi rested on defendant Martin Viloria's testimony that he was home with his wife on the night of the murder, (Tr. Vol. IX at 34-58), and Mrs. Viloria's testimony that Martin was with her all night and did not awake until the next morning when she asked him to kill a snake on her kitchen windowsill. Mrs. Viloria testified she remembered the night clearly because she and Martin had been

invited to a barbecue with the other defendants, and had an argument when he refused to go. (Tr. Vol. IX at 17-21).

As the Appellate Division said, if the prosecutor's statement that appellant Viloria had not raised this defense at the first trial was false, it was "false only in a hypertechnical sense." Sip op. at 16. Although Viloria filed a notice of alibi defense prior to the first trial, he did not raise the alibi defense in that trial, and neither he nor his wife testified. Moreover, the thrust of the prosecutor's statement was that the Vilorias had told the story about their argument over the barbecue and the snake incident for the first time at the second trial, and this statement by the prosecutor was true.

4. Prosecutor's Comment on Viloria's Post-Arrest Silence

We respectfully disagree with the Appellate Division's conclusion that no error occurred in connection with the prosecutor's comments on Viloria's failure to raise his alibi defense when he was arrested.

A prosecutor may not comment on a defendant's post-arrest silence when that silence follows Miranda warnings. *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Newman*, 943 F.2d 1155 (9th Cir. 1991). In such circumstances the arrestee's silence is ambiguous because, "in the wake of these warnings, [it] may be nothing more than the arrestee's exercise of these Miranda rights." *Doyle*, 426 U.S. at 617. The Appellate Division found no error on the ground Viloria had waived his Miranda rights by speaking to the police. (Viloria's ER exhibit E at 17).

All Viloria said to the police was that he would cooperate if the police would tell him who had snitched on him. The police advised him they would make no deals, and Viloria then refused to answer any questions. While a defendant waives his Miranda rights by voluntarily speaking to the police after warnings have been given, he may revoke that waiver simply by "indicat[ing] in some manner that he wishes to remain silent." *United States v. Lorenzo*, 570 F.2d 294, 298 n.1 (9th Cir. 1978). This case is indistinguishable from *United States v. Branson*, 756 F.2d 752 (9th Cir. 1985), in which we found a *Doyle*

violation even though the defendant answered some of the officer's questions at the time of his arrest.

5. Prosecutor's Comments on Mrs. Viloria's Silence

Viloria argues that the prosecutor's closing argument included an improper comment on his wife's failure to come forward with her story at the time of his arrest and on her failure to testify in the first trial.[4]

The Appellate Division held the prosecutor's comment on Mrs. Viloria's silence at the time of her husband's arrest was improper because the prosecutor suggested that, if she had advised the police that her husband was with her at the time of murder, he would have been immediately released from prison, and the prosecutor must have known his statement to be false. We agree. *Cf. People v. Lindsey*, 205 Cal. App. 3d 112, 117 (1988).[5] However, the prosecutor's comment on Mrs. Viloria's failure to testify in the first trial was not improper. A prosecutor may comment on the defendant's failure to call witnesses. *United States v. Reyes*, 966 F.2d 508, 509 (9th

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[4] The prosecutor's statement was as follows:

Then we have, also, his wife. As of last week, she didn't seem to have a clue of why she was outside in the hallway waiting to come in. As of March, the only thing she knew was that Martin was home every night, every night. You notice how Martin kind of switched on that?

We then have, back in March, none of this story. None of this story. Would a woman leave her husband . . . in for so long? Yesterday was the first time we heard that. She sat through the whole first trial, listening to all the evidence, as well as Martin. Yesterday is then when we hear it. Would a woman leave the father of her children? The man she's married to, sit in jail and wait until this long, more than a year later, and come forth and say, "Oh yeah. Oh, yeah, this is the story. It wasn't the story in March. It wasn't the story last week, but this is the story." I submit to you that may raise doubt, but, that is not reasonable doubt.

[5] The court held in *Lindsey* that a similar argument was also an improper comment on the defendant's post-arrest silence. We express no opinion on that issue. We merely hold that the prosecutor engaged in prosecutorial misconduct because the implication of his argument was patently untrue.

Cir.1992); *United States v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1989).

Conclusion

Because the trial court's erroneous statement regarding reasonable doubt was not harmless error, the convictions are vacated and the case is remanded for trial.

APPENDIX C

DISTRICT COURT OF GUAM
TERRITORY OF GUAM
APPELLATE DIVISION

No. 90-00092A

PEOPLE OF THE TERRITORY OF GUAM
Plaintiff-Appellee
vs.
MARTIN MANIBUSAN VILORIA
Defendant-Appellant

No. 90-00094A

vs.
JOHN GOKITA MANIBUSAN
Defendant-Appellant

No. 90-00096A

vs.
DANIEL LUCIEN TURNER
Defendant-Appellant

OPINION
[Filed November 18, 1991]

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Attorney for Appellant Daniel Lucien Turner:	Robert E. Hartsock Hartsock & Somerfleck 135 Archbishop Flores, Ste. 100 Agana, GU 96910

BEFORE: MUNSON,* District Judge, GOODWIN,** Senior Circuit Judge, and CROCKER,***

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* Honorable Alex R. Munson, United States District Judge for the District of the Northern Mariana Islands, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

** Honorable Alfred T. Goodwin, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

*** Honorable M.D. Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation in accordance with 48 U.S.C. § 1424b(a).

This is a direct appeal from a judgment of the Superior Court of Guam (Siguenza, J.) sentencing Martin Manibusan Viloria, John Gokita Manibusan, and Daniel Lucien Turner to life imprisonment without possibility of parole and other lesser terms for aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony. Defendants allege at least fifteen instances of reversible error: violations of their Fifth, Sixth, and Fourteenth Amendment rights during the trial itself resulting form argument made by the prosecutor and from decisions made by the judge. Because the court was correct in most instances, because of the overwhelming evidence of guilt, and because under the totality of the circumstances what errors were made were harmless, we conclude that the convictions should be AFFIRMED.

ISSUES

1. Did the Guam Superior Court improperly rule that principal prosecution witness Joseph G. Manibusan was a hostile witness, who could therefore be asked leading questions?
2. Did the Guam Superior Court err in allowing hearsay impeachment of principal prosecution witness Joseph G. Manibusan by his ex-wife and a police officer?
3. Did the Guam Superior Court abuse its discretion in excluding an attorney as an expert witness?
4. Did the Guam Superior Court err by excluding the statement of James Leon Guerrero for the truth of the matters asserted?
5. Were the in-custody statements of Defendant Viloria improperly put before the jury and argued upon?
6. Did the Guam Superior Court err in allowing prosecutorial closing argument on facts surrounding the alibi?
7. Do the erroneous arguments of counsel warrant reversal?
8. Were the Guam Superior court's jury instructions incorrect under Guam law?

PROCEDURAL HISTORY

Because these cases arise out of the same facts and were tried together, a consolidated opinion is best suited for these appeals. The alleged crimes occurred on November 8, 1986. Two Guam police

department officers dispatched to a reported disturbance in a residence at Old Perezville found two lifeless bodies with gunshot wounds to the head. Following an investigation, Joseph G. Manibusan began cooperating on May 9, 1989, and implicated the three defendants as participants in the murders.

An indictment was filed in Superior Court of Guam Criminal Case No. CF0145-89 (District Court of Guam appellate Nos. 90-00092A, 90.00094A, and 90-00096A) on June 1, 1989 charging Martin Manibusan Viloria, John Gokita Manibusan, and Daniel Lucien Turner, respectively, each with aggravated murder, burglary, robbery, and possession and use of a deadly weapon in the commission of a felony.

On March 12, 1990, Defendant Viloria gave notice of alibi. The court granted Viloria's motion in limine (joined in by both co-defendants) to exclude his post-arrest statements to police. Decision and Order, April 23, 1990). It also granted the Government's motion in limine to exclude exculpatory statements from certain non-defendants in the defendants' case-in-chief. Decision and Order, May 7, 1990.[1] The first trial of this matter commenced on March 19, 1990 and went to the jury on April 17, 1990. Although the jury reached a guilty verdict, one juror apparently changed her mind when the jury was polled. The first case ended in a mistrial with the jury unable to reach a verdict.

A second judge, who adopted all the pretrial rulings from the first trial, presided over the second trial from July 10-27, 1990. The jury found the three defendants guilty of all counts. Following a pre-sentence investigation, the court imposed sentence on September 24, 1990. Each defendant received life imprisonment without possibility of parole for the murder, 10 years each for the robbery and burglary to run concurrently, and 20 years on the weapons charge, to run consecutively to all the foregoing. Defendant Viloria timely filed a notice of appeal on September 24, 1990, Defendant Manibusan on September 27, 1990, and Defendant Turner on October 2, 1990. Judgement was entered on October 23, 1990.

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[1] Neither Decision and Order was provided to this court by Appellant-Defendants.

Defendant Viloria filed his appellant's brief on August 16, 1991; Turner and Manibusan (incorporating the other two by reference) on September 6, 1991. The Government filed its appellee's brief on October 18, 1991. The Defendant Viloria filed his reply on October 24, 1991.

FACTS

The evidence against the three defendants ranged from very strong to overwhelming. The testimony of other alleged participants, who had pleaded guilty to the murders earlier, implicated all three defendants in the crime. Another witness, John Naholowaa, dealt with the automobile used in the crime and placed the three defendants and the two cooperating participants at the home when the deaths occurred. Other witnesses substantially corroborated their testimony.

In the course of the trial, the Government called as its first and primary witness Joseph G. Manibusan, who had implicated the defendants. H was one of the two participants in the murders who had pleaded guilty and cooperated with the Government, who were not defendants in this trial. At the first trial he testified for the government against his brother, first cousin, and the third defendant. However, after having been sentenced to 30 years incarceration in a separate proceeding, he refused to testify at the beginning of the second trial. At that time, out of the presence of the jury, the judge and each defendant's counsel questioned him. Later that day, the prosecutor recalled Joseph Manibusan and asked him if he remembered going to the specific house where two people were killed in early November, 1986. Joseph Manibusan replied, "No." The prosecutor then asked, "What is it you do remember?" Manibusan responded, "I don't recall going to anybody's house and killing them." The prosecutor questioned, "you don't, ever?" Manibusan answered, "No." At this point the Government moved and the court granted that Manibusan be designated as a "hostile," witness, thereby subjecting him to leading questions by the Government.

Subsequently, the Government called Joseph Manibusan's ex-wife and a police officer, who made several hearsay statements which were admitted over objection as impeachment. Manibusan

had substantially recanted his original trial testimony adverse to the defendants.

Near the close of testimony, counsel for Defendant Viloria made an offer of proof that a former chief deputy prosecutor for the Attorney General's office, with over 40 criminal jury trials, would answer a hypothetical question as an expert in criminal law. He would opine that a previous Government witness, John Naholowaa, who placed the three defendants and the two cooperating co-defendants at the home when the deaths occurred, could have been indicted on the basis of his testimony. This offer of proof, to impeach Naholowaa's cross-examination testimony that he did not have a deal with the prosecution, was rejected by the judge.

The court also excluded Defendant Viloria's attempt to introduce the out-of-court statement of James Leon Guerrero, adhering to its granting of the Government's motion in limine to exclude exculpatory statements from certain non-defendants in the defendants' case-in-chief. Decision and Order, May 7, 1990. The judge in the first trial had ruled that the exculpatory statement, implicating Defendant John Manibusan and a stranger to the trial, was made under suspect circumstances and was untrustworthy. James Leon Guerrero refused to testify at the trial on Fifth Amendment grounds. After adopting the original ruling and excluding the statement from Defendant Viloria's case-in-chief, the court did allow a redacted version into evidence, with a limiting instruction, for impeachment purposes. (TR Vol. X, 31-32).

The court had granted Viloria's motion in limine to exclude his post-arrest statements to police in the prosecutor's case-in-chief. Decision and Order, April 23, 1990. during the Defendants' case-in-chief the Government elicited from Defendant Viloria his statement to the police that he didn't know anything about the murders and had nothing else to say. Immediately afterward, over objection, the prosecutor asked Viloria if he had offered to make a deal with a police officer to cooperate and tell who was involved in exchange for information about the identity of the "snitch," which Viloria denied. The Government obtained testimony rebutting the denial from one of the three police officers who had been in the vehicle at the time. In closing argument, the Assistant Attorney General argued that willingness to make a deal indicated knowledge and involvement.

Throughout the trial, the Government attacked Defendant Viloria's alibi defense. Although he had filed his notice of alibi as early as March 12, 1990, Defendant Viloria did not call his wife to testify in support of the alibi at the first trial. During the trial and at closing argument, the prosecutor sought to establish that the alibi was recently fabricated. He asked why Defendant Viloria had spoken to the police on some matters, but hadn't mentioned his alibi. He asked why Viloria's counsel had let him remain incarcerated rather than bring the evidence to the police or Attorney General, and said that if he had done so, he wasn't a very good lawyer. He asked why his wife had let her husband the father of her children sit in jail for so long before mentioning the story. The prosecutor aggressively attacked Defendant Viloria's alibi, which was his sole defense, throughout the trial and at closing argument.

During closing argument, the prosecutor made some comments that Defendants' rebuttal witnesses' statements, whose testimony the judge had permitted accompanied by a limiting instruction that it was not introduced for the truth of the matters asserted, "were not the truth." The prosecutor also alluded to Defendant Viloria's arrest record.

During the jury instructions, the judge did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict. During Defendant Manibusan's closing argument, counsel referred to a demonstrative chart listing a jury instruction used in the first trial by rejected in the second and stated:

> Now, if the evidence in this case reasonably permits either of two conclusions, one of innocence, one of guilty [*sic*] --- meaning you look at different sets of facts and you listen to our arguments and you say,
>
> "Well, it could reasonably go that way. I could reasonably see that they've done it. But on the other hand, I could reasonably see that these guys are fabricating and they did come up with a story, that's reasonable. And I listened to the statements made by Cathy Burger and the person labelled 'A' [James Leon Guerrero], and it is reasonable that maybe these guys didn't do it,"

— you don't have a choice. You have to come back with a not guilty verdict. So when you're given a choice between two, and they're both reasonable, you have to come back with a not guilty verdict. Again, that's the law.

The judge interrupted and, after a sidebar, stated that item number four on the chart was not an accurate statement of the law. (TR Vol. X, 148: 1-2).

STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion, *United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981), as are particular jury instructions. *United States v. Aguon*, 851 F.2d 1158, 1161 (9th Cir. 1988). Prosecutorial argument is reviewed according to a "harmless error" standard. *United States v. McKoy*, 771 F.2d 1207 (9th Cir. 1985). Unobjected-to jury instructions are generally reviewed for plain error. *People of the Territory of Guam v. Yang*, 850 F.2d 507, 512 n.8 (9th Cir. 1988).

If the trial court is found to have erred relating to the deprivation of constitutional rights, under the federal constitutional standard enunciated by the Supreme Court, an error may be deemed harmless only if an appellate court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967).

ANALYSIS

HOSTILE WITNESS

Defendants argue that the court improperly ruled that principal prosecution witness Joseph Manibusan was a hostile witness. Leading questions are permitted of hostile witnesses. 6 Guam Code

Annot. § 611(c) (Guam Rules of Evidence).[2] In the immediate prior testimony no extensive foundation established that he was hostile.

However, the brief exchange before he was ruled "hostile" contained evasive and ambiguous testimony clearly in conflict with his previous testimony under oath on March 29, 1990. See, *Thomas v. Cardwell*, 626 F.2d 1375, 1384-86 (9th Cir. 1980). When Joseph Manibusan refused to testify that morning, the judge proceeded to voir dire the witness, followed by each attorney questioning him. After finding the witness "hostile" that afternoon, the judge asked counsel if they wished to voir dire and only one took advantage of the offer. No objections were made to the finding that the witness was "hostile". His previous trial testimony was later admitted in total as substantive evidence without objection. (TR Vol. II, 114: 21). The judge did not abuse his discretion in designating Joseph Manibusan a hostile witness.

HEARSAY IMPEACHMENT

After Joseph Manibusan recanted his testimony of the first trial, the Government naturally sought to impeach him. The credibility of a witness may be attacked by any party, including the party calling him. 6 Guam Code Annot. § 607. Once a witness is afforded an opportunity to explain or deny a prior inconsistent statement and the opposite party is afforded an opportunity to interrogate him, extrinsic evidence of the prior inconsistent statement is admissible. 6 Guam Code Annot. § 613(b). Here, the evidence was Joseph Manibusan's independent conversations with a police officer and with his ex-wife, corroborating his testimony at the first trial.

Such extrinsic verbal evidence of the witness' prior inconsistent statement will always be hearsay, by definition. Regarding this impeachment of Joseph Manibusan by his ex-wife and a police officer, the judge instructed the jury about the limited purpose of

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[2] The cited Guam Rules of Evidence, Title 6 of the Guam Code Annotated, were adopted from the Federal Rules of Evidence and are interpreted the same as the Federal Rules. *Guam v. Ojeda*, 758 F.2d 403, 406 (9th Cir. 1985).

prior inconsistent statements. The court did not err in allowing the testimony.

ATTORNEY AS EXPERT WITNESS

Defendant Viloria sought to call a criminal law attorney as an expert witness to opine that prosecution witness John Naholowaa could have been indicted on the basis of his testimony. this offer of proof, to impeach John Naholowaa's statement that he did not have a deal with the prosecution, was for the purpose of attacking his credibility. The attorney was not being called to apply the law to particular facts of this case, which is a prohibited usurpation of the judge's duty. *Downer v. Bramet*, 152 Cal.App.3d 837, 841-42, 199 Cal.Rptr. 830, 832-33 (1984) (Kaufman, J.), but rather to supply a motive for Naholowaa's testimony. However, there was no evidence whatsoever that Naholowaa had any sort of agreement with the prosecution. The credibility challenge ensuing from the proffered opinion would have been mere speculation. Opinion evidence need be admitted only if it will assist the trier of fact. 6 Guam Code Annot. § 607. the judge did not err in exercising his discretion to exclude the attorney would-be expert witness.

EXCLUSION OF STATEMENT FOR TRUTH OF MATTERS ASSERTED

Defendant Viloria wanted to introduce the out-of-court statement of James Leon Guerrero, implicating Defendant John Manibusan and a stranger to the trial, as part of his case-in-chief for the purposes of exculpating Viloria by implicating others, impeaching Joseph Manibusan's statement made in the first trial, and corroborating his alibi defense. He argues that the statements were admissible under the hearsay rules, and that the Confrontation Clause mandates their admission.

Hearsay statements of a non-defendant are admissible if the declarant is exempted by a ruling of the court from testifying, 6 Guam Code Annot. § 804(a)(1), the statement is against penal interest, 6 Guam Code Annot. § 804(b)(3), and corroborating circumstances clearly indicate the trustworthiness of the statement.

Id.; *U.S. v. Brainard*, 690 F.2d 1117, 1123-25 (4th Cir. 1982). Here, the Judge found that the statement was made under suspect circumstances and was untrustworthy.

Viloria notes that the police officer to whom the statement was made, after the declarant had been arrested and jailed, found it believable because he thought it contained information about the crime scene that only a participant would know. However, another police officer, more knowledgeable of the true facts of the case, concluded form the statement that the declarant was not involved. The court found the latter testimony persuasive, and the conclusion that the statement was untrustworthy as not clearly erroneous. Therefore, whether or not the our expressly referred to 6 Guam Code Annot. § 804(a)(1), after both prosecution and defense had cited it, is irrelevant. Although the corroborating circumstances need not be sufficient to remove all doubt, *Brainard*, 690 F.2d at 1125 n.14, the corroborating circumstances must clearly indicate the trustworthiness of the statement. 6 Guam Code Annot. § 804(b)(3) (emphasis added).

The common law hearsay rule is older than the Constitution. The failure to admit the statement on hearsay grounds does not violate the Defendants' right to confront witnesses. While not admitted to implicate others or corroborate an alibi defense, it was permitted in redacted form for impeachment. Exclusion of James Leon Guerrero's statement for the truth of the matters asserted was not error.

DEFENDANT VILORIA'S STATEMENTS

Defendant Viloria objects to the use of his post-arrest statements about not knowing of the murders but then trying to bargain with the police, the hearsay statements to that effect after his denial, and the Government's argument thereon.

The prosecutor argued that Viloria's willingness to make a deal indicated knowledge and involvement in the murder. He also pointed out that John Naholowaa had told the police, in tears, that he hadn't come forward earlier because "snitches die." He argued that

upon arrest Viloria had not mentioned a word about his alibi that he had been at home, but only wanted to know about the snitch.

Viloria avers that this introduction of his post-arrest statements and the prosecutor's argument upon it were a blatant violation of the first trial judge's ruling on his motion in limine excluding such statements. Decision and Order, April 23, 1990.[3] However, the second trial judge apparently viewed the exclusion as applying to the prosecutor's case-in-chief only. By taking the stand, Viloria opened the door himself to cross-examination on issues of fabrication and prior inconsistent statements. 6 Guam Code Annot. § 613. the in-custody statements of Defendant Viloria were properly put before the jury and argued upon.

PROSECUTORIAL COMMENT ON ALIBI

Defendant Viloria asserts that the prosecutor's comments on his alibi defense were reversible error and violative of his Sixth and Fourteenth Amendment rights for three reasons: (1) the prosecutor intentionally and falsely stated that Viloria hadn't asserted the defense before trial, (2) the use of his pre-trial silence as evidence against him violates due process, and (3) his counsel was disparaged as incompetent for failing to secure his release from jail based upon the alibi.

The alibi defense, that Viloria was at home at the time of the crimes, was his only defense. The Government at every turn sought to show that the alibi was recently fabricated. The core of Defendant's argument is that the prosecutor falsely, on several occasions, stated that Viloria had not asserted the alibi before trial when, in fact, he had filed his notice of alibi with the court on March 12, 1989, a week before the trial began.

Considering that the alleged crimes occurred on November 8, 1986, the three co-defendants were arrested in late May 1989, they were indicted on June 1, 1989, and the first trial began on March 19, 1990, the one week inaccuracy by the prosecutor was immaterial, a

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[3] See footnote 1, supra.

de minimus round-off error. To state that Viloria hadn't asserted the alibi before the first trial was false only in a hypertechnical sense, and did not mislead the jury.

Even as to the second trial, although an official notice of alibi had been signed for the first trial, Defendant Viloria did not call his wife to testify in support of the alibi at that trial. When arguing or questioning why Viloria hadn't brought up the alibi previously, there was no requirement to add a verbal footnote each time, "except for counsel's filing of notice a week before the first trial." Viloria's counsel was free to emphasize this filing if desired. The first time the Government heard certain alibi testimony by Mrs. Viloria about a domestic dispute, a birthday, and killing a snake in her home was when she testified at the second trial. The Government presented four rebuttal witnesses to the facts surrounding the asserted alibi defense. (TR Vol. IX, 60-88). The prosecutor's comments on the timing of his alibi defense to not violate due process. A testifying defendant who has waived his Miranda rights and spoken to the police can be impeached by his post-arrest silence that is inconsistent with his trial testimony. *People v. Lindsey*, 205 Cal.App.3d 112, 116 n.2, 252 Cal.Rptr. 96, 98 n.2 (1988). In *Lindsey*, where the conviction was reversed based upon prosecutorial comment on counsel's failure to assert the alibi, the defendant did not testify. Id. Of course a defendant who does not waive his Miranda rights and speak to the police, unlike this case, may not be impeached by that silence, since he is merely exercising his rights. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976); *People v. Galloway*, 100 Cal.App.3d 551, 160 Cal.Rptr. 914 (1979). Here, the use of Viloria's pre-trial silence is permissible and does not violate due process.

Like the prosecutor in *Lindsey*, the prosecutor here asked why Viloria's counsel had let him remain incarcerated rather than bring the evidence to the police or Attorney General, and said that if he had done so, he wasn't a very good lawyer. Viloria notes that here his attorney had filed a notice of alibi, and an attorney speaks for his client. *Lindsey*, 205 Cal.App.3d at 116-17, 252 Cal.Rptr. at 98. Although the timing of the notice is not critical, counsel is entitled to make tactical decisions free of prosecutorial attack on them.

> Additionally, the prosecutor's comments improperly disparaged defense counsel, implying counsel was incompetent in failing to reveal the alibi and thereby secure Lindsey's release from jail. This implication was unfair because it was based on the premise -- perhaps plausible to nonlawyers but absurd to any knowledgeable attorney — that the prosecutor would simply have dropped all charges merely because Lindsey's mother claimed he was at home in bed during the robbery. Alternatively, the comments improperly implied defense counsel did not believe the alibi or had participated in its fabrication. [Citation omitted.] [n.3] The prosecutor was not entirely to blame, as the court permitted the improper comments over defense counsel's objection.

Lindsey, 205 Cal.App.3d at 117, 252 Cal.Rptr. at 98. The Government in this case would have been even less likely to drop aggravated murder charges based on his wife's testimony than the robbery charge in *Lindsey*. This aspect of the prosecutorial comment on alibi is on all fours with *Lindsey*.

This error is of constitutional dimension and thus subject to the test for prejudice set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). The judgment must be reversed unless the error was harmless beyond a reasonable doubt.

The test is the importance of the issue to the defense, and whether the evidence against the defendant is less than overwhelming. *Lindsey*, 205 Cal.App.3d at 117, 252 Cal.Rptr. at 98. Here the alibi defense was vital. However, we do not agree with the defendants as to the degree of evidence against them.

Although prosecution witnesses recanted testimony, prior testimony was admitted. Two co-defendants who had pleaded guilty to the murders implicated their peers, and another witness testified as to their transportation to the scene. Other witnesses corroborated this testimony. While a prior hung jury may be taken into consideration. *U.S. v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987), it is not dispositive. The second jury found defendants guilty of all charges.

The improper remarks were not unduly prejudicial. Certainly, the prejudicial remarks did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct., 2464, 91 L.Ed.2d 144 (1986) (much more factually egregious); *Deutscher v. Whitley*, 884 F.2d 1152, 1157 (9th Cir. 1983) (same). Here, the trial judge gave a final instruction about the argument of counsel not being evidence. The remarks were not reversible error.

ERRONEOUS CLOSING ARGUMENT

Defendant Viloria contends that his due process rights were violated by the prosecutor's erroneous comments during closing argument that impeachment evidence was "not the truth" and about his prior arrest record. Viloria had introduced the out-of-court statements of James Leon Guerrero and another witness to rebut testimony of Joseph Manibusan and the other two Government percipient witnesses. The judge gave a limiting instruction that these statements, which the court had excluded for the truth of the matters asserted, supra at 12-13, were admitted only for the purpose of showing that the Government witnesses did not have exclusive knowledge of the facts of the case or that persons who are strangers to the trial also knew facts about these crimes. The judge concluded:

> You were also further instructed that you may not consider whether or not these statements were made for the truth of the matter asserted. If one or another of these persons has implicated himself or third parties in his or her statement, you may not consider if those allegations are true. You may only consider the fact that strangers to the trial, individual "A" [James Leon Guerrero] and Cathy Burger, had information about this case that they had given to the authorities, and which may show that Government witnesses who have testified may not have had personal knowledge of the facts to which they have testified. Do not consider this evidence for any purpose except the limited purpose for which it is admitted.

The prosecutor in his rebuttal argument said, "Statement A is not put in for the truth of the matter asserted. That is not truth. The judge instructed you as such."

The statement "That is not truth," is not the same as "That is not the truth," or It is not true." If the latter meanings are given, a legitimate argument as to credibility becomes error when blessed with the court's imprimatur. The statement "That is not truth," could also mean, "That is not something put in for the truth of the matter asserted." However, the ambiguity makes the prosecutor's argument error.

A prosecutor's argument to the jury does not violate the Constitution unless it renders the Defendant's trial so fundamentally unfair as to deny him due process. A misstatement of the law can deny due process, but reversal is not warranted unless the misstatement prejudiced the proceeding. *Darden*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144; *Deutscher*, 884 F.2d at 1152. Even the judge did not understand the prosecutor to mean that the impeachment was not true. TR Vol.X, 252. The erroneous comments on the impeachment statements are not so fundamentally unfair as to have prejudiced the entire proceeding. The fact that the Government witnesses were themselves criminals does not make the total evidence, the credibility of which was evaluated by the jury, any less overwhelming. In view of the entire transcript, particularly Volume X, the prosecutor's misstatement was harmless.

Evidence of a prior arrest or conviction is permissible for impeachment if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. 6 Guam Code Annot. § 609(a)(1). The judge admitted this evidence, but forbade mention of the arrest for the current charges. The judge's decision, and the prosecutor's reference to drug dealing and a 1977 grand theft, were not improper.

JURY INSTRUCTIONS

During the jury instructions, the judge gave a standard reasonable doubt instruction but did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict.

The judge gave a standard reasonable doubt instruction based upon Guam law. TR Vol. X, 3:15-22, 238; 8 Guam Code Annot. § 90.23(a) (Criminal Procedure Code).[4] "In charging a jury, the court may read subsection (a) to the jury and no further instruction defining reasonable doubt need be given." 8 Guam Code Annot. § 90.23(b).

> Section 90.23(b) clearly gives a trial court in Guam neither the unbridled discretion to instruct the jury in any language it chooses, nor the liberty to embellish the statutory instruction. The statutory instruction reflects the Guam Legislature's choice of the definition which it felt best avoided the danger of confusing a jury on the matter of reasonable doubt, by constraining a trial judge in the formulation of an appropriate instruction.

People of the Territory of Guam v. Yang, 850 F.2d 507, 513 n.9 (9th Cir. 1988) (en banc).

During closing argument, counsel for Defendant Manibusan attempted to give part of an instruction similar to *California Jury Instructions, Criminal (CALJIC)* 2.01, ¶¶ 3-4 (5th ed. 1988). Neither party, including a criminal defendant, may insist upon any particular language. *U.S. v. Pallan*, 571 F.2d 497, 501 (9th Cir. 1978). Following *Yang*, however, a trial judge's discretion to use alternate wording is limited. The instruction must be a "moral certainty" standard rather than a "hesitate to act" standard. *Yang*, 850 F.2d at 513. To be safe, Guam judges often use the statutory wording verbatim, as here.

Title 8 Guam Code Annot. § 90.19 requires that proposed jury instructions be delivered to the court for approval before argument. The judge stated that the unapproved ["jury instruction"] statement

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[4] Title 8 Guam Code annot. § 90.23(a) provides: Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence,e leaves the mind of the trier of fact in the condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."

of law on a chart referred to during Defendant Manibusan's closing argument was "not an accurate statement of the law." While *CALJIC* 2.01 is not incorrect as a matter of constitutional law, *U.S. v. James*, 576 F.2d 223, 227 n.3 (9th Cir. 1978), it was improper inasmuch as it was not the approved jury instruction for this jurisdiction or one submitted for this trial.

Moreover, the effect of the statement was overcome by the instruction actually read to the jury previously concerning reasonable doubt, which was clearly correct. Also, all three defense counsel went on to explain the reasonable doubt standard to the jury. One even mentioned the "hesitate to act standard." TR Vol. X, 194. Additionally, the judge's interruption was induced by defense counsel bringing before the jury an instruction other than the one approved by the court, which could have confused the jury. Thus, defense counsel invited the interruption. The court did not abuse its discretion in selecting the correct jury instruction to be used. The judge properly halted the presentation of an alternate jury instruction or potentially confusing statement of law. Although stating that counsel's demonstrative charge regarding reasonable doubt was "not an accurate statement of the law" was not the best choice of words, in view of the undisputedly correct instructions given to the jury, this misstatement does not amount to reversible error.

The court also did not give an instruction that the jury must decide the case solely on the evidence presented in the second trial and must not consider the fact of the first trial in reaching a verdict. *Manual of Model Criminal Jury Instructions for the Ninth Circuit* § 2.09 (West 1989). This instruction should not be given unless specifically requested by the defendant. Id. Here, the defendants did not make such a request, the prosecution did. At any rate, such an instruction may well have confused the jury, as much of the evidence was taken from that trial.[5] An additional explanation would have been needed to distinguish the fact of the first trial from the evidence in the first trial, to make clear that the latter had been incorporated into the second trial. There was no error in failing to give this instruction not requested by any defendant.

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[5] After several Government witnesses recanted, their testimony from the first trial was read into the record without objection.

CONCLUSION

With the exception of the prosecutor's intentional disparagement of counsel regarding the alibi and his misstatement that impeachment statements "were not the truth," the argument presented was not improper. The statements and evidentiary rulings of the judge were not clearly erroneous nor abusive of discretion. Indeed, a de novo review would have brought the same results. Under the *Chapman* standard the prosecutor's errors were harmless beyond a reasonable doubt. The convictions are AFFIRMED.

/s/ Alex R. Munson
ALEX R. MUNSON
District Judge

/s/ Alfred T. Goodwin
ALFRED T. GOODWIN
Circuit Judge

/s/ M.D. Crocker
M.D. CROCKER
District Judge

APPENDIX D

IN THE SUPERIOR COURT OF GUAM
TERRITORY OF GUAM

Criminal Case No. CF 145-89

PEOPLE OF THE TERRITORY OF GUAM

vs.

DANIEL L. TURNER,
MARTIN M. VILORIA,
JOHN G. MANIBUSAN,

Defendants.

JUDGMENT
[Filed October 23, 1990]

WHEREAS, on the 1st day of June, 1989, an indictment was filed charging defendants with: Aggravated Murder (First Degree Felony) (2 Counts); Aggravated Murder (First Degree Felony) (4 Counts); Robbery (Second Degree Felony); Burglary (Second Degree Felony) and Possession and Use of a Deadly Weapon in the Commission of a Felony (3 Counts) committed on or about the 8th day of November, 1986 in the Territory of Guam and on arraignment the defendants pleaded not guilty to the charges and demanded a jury trial.

WHEREAS, ON THE 9th day of July, 1990, the jury having been impanelled and the trial having been regularly had and by the verdict of the jury on July 27, 1990, found the defendants Daniel L. Turner, Martin M. Viloria and John G. Manibusan guilty of the offenses of: Charge One, Aggravated Murder (First Degree Felony) (2 Counts); Charge Two, Aggravated Murder (First Degree Felony) (4 Counts); Charge three, Robbery (Second Degree Felony); Charge four, Burglary (Second Degree Felony); and Charge five, Possession and Use of a Deadly Weapon in the commission of a Felony, Count 2.

The defendants appeared on September 20, 1990 for sentencing.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that:

For the offenses of Aggravated Murder, (First Degree Felony) (2 Counts) and Aggravated Murder, (First Degree Felony) (4 Counts), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to life imprisonment without the possibility of parole, probation, work release or education outside the confines of the prison.

For the offense of Robbery (First Degree Felony), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to ten (10) years confinement at the Department of Corrections with three (3) years special parole. This sentence shall run concurrently with the above sentence.

For the offense of Burglary (Second Degree Felony), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to ten (10) years confinement at the Department of Corrections with three (3) years special parole. This sentence shall run concurrently with the above sentences.

For the offense of Possession and Use of a Deadly Weapon in the Commission of a Felony (2 Counts), the defendants, Daniel L. Turner, Martin M. Viloria and John G. Manibusan are sentenced to twenty (20) years confinement at the Department of Corrections. This sentence shall run consecutively to all of the above sentences.

Dated this 23rd day of October, 1990.

/s/ Peter C. Siguenza, Jr.
PETER C. SIGUENZA, JR.
JUDGE, SUPERIOR COURT OF GUAM

APPENDIX E

STATUTORY PROVISIONS INVOLVED

ORGANIC ACT OF GUAM
48 USC §§ 1421 et seq.

§ 1424. District Court of Guam; local courts; jurisdiction

(a) District Court of Guam; local courts

The judicial authority of Guam shall be vested in a court of record established by Congress, designated the "District Court of Guam," and such local court or courts as may have been or shall hereafter be established by the laws of Guam in conformity with section **1424-1** of this title.

(b) Jurisdiction

The District Court of Guam shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States.

(c) Original jurisdiction

In addition to the jurisdiction described in subsection (b) of this section, the District Court of Guam shall have original jurisdiction in all other causes in Guam, jurisdiction over which is not then vested by the legislature in another court or other courts established by it. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by the laws of Guam for the purpose of determining the requirements of indictment by grand jury or trial by jury.

§1424-1. Local courts; composition; appellate court; jurisdiction; practice and procedure; qualifications and duties of judges

(a) Composition; establishment of appellate court

The local courts of Guam shall consist of such trial court or courts as may have been or may hereafter be established by the laws of Guam. On or after the effective date of this Act, the legislature of Guam may in its discretion establish an appellate court.

(b) Jurisdiction

The legislature may vest in the local courts jurisdiction over all causes in Guam over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the exclusive or concurrent jurisdiction conferred on the District Court of Guam by section **1424(b)** of this title.

(c) Practice and procedure; qualifications and duties of judges

The practice and procedure in the local courts and the qualifications and duties of the judges thereof shall be governed by the laws of Guam and the rules of those courts.

§ 1424-2. Relations between courts of United States and courts of Guam; review by United States Court of Appeals for Ninth Circuit; reports to Congress; rules

The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings: *Provided*, That for the first fifteen years following the establishment of the appellate court authorized by section **1424-1(a)** of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of

certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

§ 1424-3. Appellate jurisdiction of District Court; procedure; review by United States Court of Appeals for Ninth Circuit; rules; appeals to appellate court

(a) Appellate jurisdiction of District Court

Prior to the establishment of the appellate court authorized by section **1424-1(a)** of this title, the District Court of Guam shall have such appellate jurisdiction over the local courts of Guam as the legislature may determine: *Provided*, That the legislature may not preclude the review of any judgment or order which involves the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the Government of the United States, or the conformity of any law enacted by the legislature of Guam or of any orders or regulations issued or actions taken by the executive branch of the government of Guam with the Constitution, treaties, or laws of the United States, including this chapter, or any authority exercised thereunder by an officer or agency of the United States.

(b) Appellate division of District Court; quorum; presiding judge; designation of judges; decisions

Appeals to the District Court of Guam shall be heard and determined by an appellate division of the court consisting of three judges, of whom two shall constitute a quorum. The district judge shall be the presiding judge of the appellate division and shall preside therein unless disqualified or otherwise unable to act. The other judges who are to sit in the appellate division of any session shall

be designated by the presiding judge from among the judges who are serving on, or are assigned to, the district court from time to time pursuant to section **1424b** of this title: *Provided*, That no more than one of them may be a judge of a court of record of Guam. The concurrence of two judges shall be necessary to any decision of the appellate division of the district court on the merits of an appeal, but the presiding judge alone may make any appropriate orders with respect to an appeal prior to the hearing and determination thereof on the merits and may dismiss an appeal for want of jurisdiction or failure to take or prosecute it in accordance with the applicable law or rules of procedure.

(c) United States Court of Appeals for Ninth Circuit; jurisdiction; appeals; rules

The United States Court of Appeals for the Ninth Circuit shall have jurisdiction of appeals from all final decisions of the appellate division of the district court. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

(d) Appeals to appellate court; effect on district court

Upon the establishment of the appellate court provided for in section **1424-1(a)** of this title all appeals from the decisions of the local courts not previously taken must be taken to the appellate court. The establishment of that appellate court shall not result in the loss of jurisdiction of the appellate division of the district court over any appeal then pending in it. The rulings of the appellate division of the district court on such appeals may be reviewed in the United States Court of Appeals for the Ninth Circuit and in the Supreme Court notwithstanding the establishment of the appellate court.

CERTIFICATE OF MAILING

I, J. ANDREW ARTERO-BONAME, hereby certify that on Monday, the 24th day of May, 1993, I caused three copies of the foregoing PETITION FOR WRIT OF CERTIORARI to be served upon Respondents, by depositing same in the United States Mail, first class postage pre-paid, addressed to Respondents' counsels of record, at their last known address as follows:

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Dated this 24th day of May, 1993.

J. ANDREW ARTERO-BONAME
Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 24th day of May, 1993.

CYNTHIA M. REKDAHL
NOTARY PUBLIC
In and for the Territory of Guam
My Commission expires: Mar. 25, 1996